GAINING SOME PERSPECTIVE IN TORT LAW: A NEW TAKE ON THIRD-PARTY CRIMINAL ATTACK CASES

by
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Despite the prominence of the objective "reasonable person standard" in tort doctrine, it is a mistake to conclude that perspective has no place in contemporary tort law. Although explicit perspectival standards, such as the "reasonable woman standard," have gained little acceptance in torts, the perspectives and experiences of non-dominant social groups have sometimes been taken into account in key contexts that involve "culturally polarized understandings of fact" and differing judgments about what constitutes reasonably safe behavior. Notably, the battle has not been over precise formulations of the duty to exercise reasonable care, but over whether to impose a duty to exercise reasonable care in the first instance.

This Article examines third-party criminal attack claims against landlords, businesses, employers, and other entities charged with negligence for failing to detect and remedy dangerous conditions and prevent sexual assaults and other criminal attacks on their premises. The victims in these cases are often women, racial minorities, and low-income residents of high-crime areas. The Article describes the lack of consensus in the courts as to whether defendants owe a duty to take reasonable measures to guard against crime and analyzes the recent position taken by the Restatement (Third) of Torts in favor of imposing a duty in all but exceptional cases. The Article endorses the willingness of some courts in sexual assault cases to impose a duty and articulate a concept of reasonable care that requires defendants to make their premises equally safe for men and women. It criticizes the line of cases which rejects a duty of due care in high-crime areas, excuses defendants from taking precautions proportionate to the risk, and thereby fails to express a norm of equal safety regardless of where a person resides.

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I. INTRODUCTION

The "objective" reasonable person standard (RPS) is a staple of tort law most frequently associated with negligence liability. It continues to be featured prominently in the new *Restatement (Third) of Torts*,[1] the influential document that attempts to describe the rules and principles that courts in the 50 states apply in tort cases.[2] A superficial glance at the *Restatement (Third)* would suggest that little has changed since the "reasonable man" morphed into the "reasonable person" somewhere along the journey from the *Restatement (Second)* (adopted in 1965) to the new version (adopted in 2005). Although the *Restatement (Third)* rejects the old sexist terminology that had rendered women invisible by presuming that "man" was a universal term, there is no discussion in the new document of the reasons for this change in terminology, suggesting that it is merely cosmetic and inconsequential.

Even more significant, the "black letter" *Restatement* rules covering the meaning of the RPS continue to adhere to the "objective" RPS, with only a few well-established, narrow exceptions. The standard still envisions a non-situated reasonable person who has no discernible gender, race, or other marker of personal identity that might influence that person's perception or viewpoint. In this respect, the *Restatement* mirrors the contemporary case law which has shown little inclination to adopt explicitly modified standards—such as the "reasonable woman standard"—to assure that the perspectives and experiences of non-dominant social groups are reflected in the law. Despite the longstanding critique of objectivity offered by critical scholars in a variety of disciplines[3] and the limited acceptance of perspectival standards in statutory civil rights law,[4] tort law has clung to the objective RPS, at least at the level of formal doctrine.

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[1] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005) [hereinafter RESTATEMENT (THIRD)].

[2] Throughout this Article, I will refer to the principles of the *Restatement (Third)* as representative of the dominant position in tort law. We must bear in mind, however, that the tort laws of the 50 states are quite diverse in character and that, on any given doctrinal point, the *Restatement* inevitably fails to capture the complexity of contemporary law.

[3] *See infra* notes 42–83 and accompanying text.

[4] *See infra* notes 85–96 and accompanying text.

However, when we look beneath the surface a bit, we can see that tort law sometimes incorporates diverse perspectives and experiences, if only in certain contexts and in some jurisdictions. Interestingly, the battleground has not been over the precise formulation of the duty of reasonable care, but rather tends to play out in heated struggles over whether to impose a duty to take reasonable care in the first instance. Elsewhere, I have written about the importance of duty in cases of emotional distress alleging workplace sexual and racial harassment, and in emotional distress cases involving sexual exploitation and reproductive harm, contexts in which some courts are willing to liberalize duty rules to provide greater protection for gender-related harms that disproportionately affect women.[5] This Article focuses on duty in physical harm cases, highlighting negligence claims for injury arising from sexual assaults and criminal attacks, and their implications for gender and racial equality. As in the emotional distress cases, the doctrine in this area is very unstable, with many courts continuing to apply restrictive no-duty rules to deny recovery.[6] Not surprisingly, the *Restatement (Third)* generally takes no position on these contested matters but has approved carefully drafted provisions which allow courts to go either way.[7]

This Article begins with a brief review of the *Restatement (Third)* provisions on the RPS as they pertain to claims for physical harm.[8] Like its predecessors, the new *Restatement (Third)* draws a sharp distinction between physical and emotional harm, providing a separate set of rules for the latter. Moreover, in discussions of the RPS in tort law, the focus usually immediately turns to how the RPS is applied in negligence cases involving physical injury, even though the concept of reasonableness (and the RPS) is pervasive throughout tort law. This preoccupation with physical harm creates the misimpression that perspective, social position, and differing life experiences are not relevant to assessments of reasonableness. Indeed, the specific *Restatement (Third)* provisions governing physical harm discussed in Part II endorse a modification of the RPS in only two limited instances: with respect to children and persons with physical disabilities.[9] From these provisions, the take-home message is that the strict, objective RPS should apply absent clear proof of a difference in the abilities or capacities of the affected groups to which the tort litigant belongs.

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[5] *See* Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights*, 44 WAKE FOREST L. REV. 1109 (2009) (discussing negligent infliction of emotional distress); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007) (discussing intentional infliction of emotional distress). *See also* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 89–117 (2010) (discussing element of duty).

[6] *See infra* notes 127–83 and accompanying text.

[7] *See infra* notes 184–94 and accompanying text.

[8] *See infra* notes 17–41 and accompanying text.

[9] *See infra* notes 29–35 and accompanying text.

In Part III, this Article pivots to provide a brief general description of the interdisciplinary research on multiple perspectives and perspectival standards and discusses some of the reasons frequently put forward for criticizing standards that purport to be objective.[10] In this Part, I explain that a move to substitute an explicitly gender-based or race-based standard for the RPS has never gained much traction in tort law, although there has been some thoughtful discussion of the topic in the scholarly literature.[11] In this respect, tort law's reluctance to move away from the RPS standard is even more pronounced than it is in statutory civil rights law, where perspectival standards have gained some currency in hostile environment claims alleging racial and sexual harassment.[12]

The heart of the Article (Part IV) explores a controversial subset of physical harm cases—third-party tort claims brought by rape victims and other victims of criminal attacks—in which the perspective or social position of a party has emerged as highly relevant, although courts are far from uniform in recognizing that perspective matters in these settings. Most often framed in highly abstract terms as a debate over whether a party owes a duty of reasonable care, these cases nevertheless require courts to make concrete decisions about whether to provide a remedy for gender- and race-linked harms, and sometimes subtly turn on considerations of gender, race, and economic status.[13] In these third-party attack cases, plaintiffs press negligence claims against landlords, businesses, employers, and other entities for failing to detect and remedy dangerous conditions or otherwise failing to take reasonable precautions to prevent the attacks. Currently, there is no consensus among courts, or even a clear trend of decisions, on the crucial issue of whether defendants owe a duty of reasonable care in such contexts. Restrictive courts apply no-duty rules to cut off liability before the claims reach the jury, while more liberal courts "find" a duty and generally permit juries to decide whether the defendants acted reasonably under the circumstances.

One striking feature of these third-party criminal attack cases, however, is their disproportionate importance to particular social groups. Thus, the third-party rape and sexual assault cases most often feature female plaintiffs and are easily coded in the public's imagination as "women's" litigation, although we know that men can be victims of sexual assault as well. Less evident is the connection between third-party criminal attack cases and race and economic status. However, when criminal attacks occur, as they often do in high-crime areas—areas characterized not only by high rates of crime, but also by high concentrations of minority and low-income persons—the victims are likely to be the residents of such locations. Denying recovery through

[10] *See infra* notes 42–83 and accompanying text.
[11] *See infra* notes 84–107 and accompanying text.
[12] *See infra* notes 108–19 and accompanying text.
[13] *See infra* notes 120–94 and accompanying text.

declarations of no-duty rules in such cases thus tends to fall more harshly on those groups that regularly encounter these heightened dangers in their everyday lives.

Part IV.A tracks the history of the debate over duty in third-party sexual rape and sexual assault cases. This Section discusses cases both imposing and rejecting a duty, and identifies a move by some courts to articulate a concept of reasonable care that contemplates an equal level of safety for both sexes. It concludes with a discussion of the provisions of the *Restatement (Third)* that presupposes a landowner's or shopkeeper's duty to exercise reasonable care to prevent violence by third-parties, except in exceptional cases in which the court is willing to rely on a countervailing policy or principle to reject a duty. Part IV.C looks at non-sexual criminal attack cases and canvasses and critiques the policy arguments courts have put forth for rejecting a duty, even when attacks are committed in high-crime neighborhoods. It makes the case for imposition of a duty in such cases through recognition of an equal right to safety for persons who live in high-crime neighborhoods.

Finally, in this age of comparative negligence, courts in third-party attack cases have had to confront the uncomfortable question of victim fault to decide, for example, whether a rape victim who sues a hotel for negligently failing to provide reasonable security should have her damages reduced because of her own "unreasonable" failure to protect herself against the risk of rape.[14] Part IV.B. examines the case law on victim fault in both acquaintance and stranger rape cases. With respect to victim fault, the courts treat sexual assault cases distinctively, evidencing a greater willingness to scrutinize the victim's behavior than in non-sexual criminal assault cases. In this novel context, feminist arguments in favor of a "no duty" rule for victims have been made to protect women's autonomy and mobility and to assure that women are not required to sacrifice their liberty for tort protection.[15]

Overall, this sketch of contemporary tort doctrine suggests an interesting relationship between norms of social equality, particularly with respect to gender, and the evolving shape of tort law. Despite a lack of perspectival standards, tort law is not always oblivious to differing perspectives and retains its capacity to promote social equality as one of many goals, alongside compensation of injured parties and deterrence of harm. Rather than attempting to incorporate non-dominant perspectives procedurally through the use of perspectival standards, however, the more prominent progressive move is one that is substantive and contextual, namely, selecting special contexts for protection, such as third-party criminal assault cases, and applying across-the-board duty (or no-duty) rules that directly promote the interests of subordinate groups.

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[14] *See infra* notes 195–209 and accompanying text.

[15] *See* Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413 (1999) [hereinafter Bublick, *Citizen No-Duty Rules*].

The Article concludes by endorsing the approach of those courts that have promoted egalitarian interests through this method.[16]

II. RPS AND PHYSICAL INJURY: THE *RESTATEMENT (THIRD) OF TORTS*

One of the basic tort concepts first encountered in a first-year torts course is that of the reasonable person. Students soon learn that the RPS is an "objective" and "universal" standard that seeks to evaluate conduct from a neutral position and does not turn on the personal characteristics or traits of the party. They are told that one advantage of such a standard is its uniformity—conduct required of the reasonable person does not vary according to a party's race, gender, intelligence, wealth, etc.—with the happy result that a minimum level of safety is secured for all persons. This simple explanation, however, is immediately complicated by the fact that the RPS is also a contextual standard: The requirement is to exercise "reasonable care under all the circumstances" of the case. Inquisitive students then often want to know whether some important fact about a person, for example, that the person is elderly or frail, qualifies as a "circumstance" that can properly be taken into account to gauge whether that person acted reasonably. At this point, the standard reply of many torts professors is to draw a distinction between the external circumstances of the case (e.g., whether it was raining at the time of the accident, whether the terrain was hazardous, etc.) and the internal personal characteristics of the party, noting that, with very few exceptions, the latter are to be excluded from the reasonableness evaluation.

What makes this standard reply so unsatisfying, of course, is the practical (and perhaps even theoretical) inability to separate external circumstances or situations from the personal identity of the actors involved in the case. At one level, we know that because judges and juries can actually see that a defendant is elderly, or that the plaintiff is a young woman, they are not likely to be able to erase such facts from their minds when it comes time to make judgments about the reasonableness of the party's actions. Even more significant, as a normative matter, the morality-laden rhetoric supporting negligence liability makes it seem inappropriate to divorce the person from the action. It is at this point that the issue of perspective comes more sharply into focus. That same inquisitive student may well ask whether it is fair to label a party's conduct unreasonable and substandard if other persons in the party's position, or who share the party's perspective, would not judge it to be so. Particularly at a time in U.S. history marked by culture wars, sharp political and ideological divides, and a growing recognition by social scientists that human perception of facts is influenced by some of the very personal traits and characteristics ruled out of bounds by the

[16] *See infra* Part V.

objective RPS,[17] we might well question whether the objective RPS is outmoded and badly in need of a makeover.

The *Restatement (Third)* provisions on the RPS in physical injury cases, however, bear no trace of this tension and in many respects look quite similar to those in the 1965 version. The principal section of the *Restatement (Third)*, Section 3, defines negligence as the failure to exercise "reasonable care under all the circumstances."[18] The comments following the section indicate that this formulation is faithful to the familiar RPS, explaining that "[b]ecause a 'reasonably careful person' (or a 'reasonably prudent person') is one who acts with reasonable care, the 'reasonable care' standard for negligence is basically the same as a standard expressed in terms of the 'reasonably careful person' (or the 'reasonably prudent person')."[19]

It is important to mention that the *Restatement (Second)* used explicitly gendered language, defining negligence as the failure to act as a "reasonable man under like circumstances" and proceeding in the commentary to discuss the "[q]ualities of the 'reasonable man'" which made up this "fictitious person," all without mention of how women might fit into the standard.[20] In accord with the common linguistic usage at the time, presumably the term "man" was meant as a universal term and it was assumed that women were automatically covered under the standard.[21] As feminists would later point out, however, such sexist language had the capacity to render women and their perspectives invisible by tacitly accepting that men and male perspectives rightly set the norms of conduct for the whole society.[22]

In contrast to its predecessor, the *Restatement (Third)* scrupulously uses gender-neutral language throughout, relying on inclusive terms such as "person" and "actor." While the new terminology is no longer offensive to women, it is not clear that it is meant to signal any substantive change in tort law. Significantly, there is no explanation for the shift in terminology, even in the section of the commentary devoted to "terminology."[23] Particularly for younger lawyers and students who have never read the prior Restatements, gender is once again invisible. The silence about the shift from "reasonable man" to "reasonable person" creates the impression that the change is not important enough to

[17] *See infra* notes 42–83 and accompanying text.

[18] RESTATEMENT (THIRD) § 3.

[19] *Id.* § 3 cmt. a.

[20] RESTATEMENT (SECOND) OF TORTS § 283 & cmt. a (1965).

[21] *See* CASEY MILLER & KATE SWIFT, THE HANDBOOK OF NONSEXIST WRITING 9–34 (1980) (discussing common use of "man" as a false generic).

[22] *See* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435, 436 (1980).

[23] RESTATEMENT (THIRD) § 3 cmt. a.

mention and that the new gender-neutral term is simply in keeping with current linguistic conventions.[24]

Section Three of the *Restatement (Third)* lists the primary factors to consider in ascertaining whether a person's conduct lacks reasonable care, namely: (1) the foreseeable likelihood that conduct will result in harm; (2) the foreseeable severity of any harm that may ensue; and (3) the burden of precautions to eliminate or reduce the risk of harm.[25] This formulation gives pride of place to the venerable Learned Hand test for negligence, often favored by law and economics adherents who tend to support negligence liability for reasons of deterrence or safety incentives.[26] However, the approach is carefully described in the *Restatement*'s commentary as a "balancing approach,"[27] a term presumably broad enough to satisfy at least some scholars in the "corrective justice" camp who support negligence liability on "fairness" grounds.[28]

For our purposes, what is most striking about the new *Restatement (Third)*'s provisions on standard of care is their strict adherence to the objective RPS, making room for only two longstanding exceptions. Thus, the *Restatement (Third)* continues to endorse a modification of the RPS only with respect to children and persons with physical disabilities. The modification of the RPS for children authorizes the most individualized standard of care: it instructs that a child's conduct be judged against "that of a reasonably careful person of the same age, intelligence, and experience . . . ."[29] In cases involving persons with physical disabilities, the applicable provision permits consideration of one trait, the physical disability, and requires that the actor's conduct conform to that of "a reasonably careful person with the same disability."[30] It should be noted that, in each instance, the objective RPS is not abandoned in favor of a subjective standard that depends on an actor's state of mind, but is merely modified to allow the fact-finder to compare the actor's conduct against other actors in the distinctive subgroup to which that actor belongs. Thus, the primary effect of modifying the objective RPS standard is to acknowledge the existence of some important differences among persons and to judge those persons only against others in their subgroup. The authorized modifications, however, are generally regarded as favorable to the targeted groups because such persons are no

[24] *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 22 (1988) ("Although tort law protected itself from allegations of sexism, it did not change its content and character.").

[25] RESTATEMENT (THIRD) § 3.

[26] *See* Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 U. ILL. L. REV. 577, 616 (2010).

[27] RESTATEMENT (THIRD) § 3 cmt. e.

[28] *See* Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 349 U. TORONTO L.J. 349, 355 (2002) (discussing corrective justice as a theoretical framework fair to both parties).

[29] RESTATEMENT (THIRD) § 10(a).

[30] *Id.* § 11(a).

longer required to conform to a standard of conduct that may be impossible for them to meet.[31]

However, courts have shown very little inclination to modify the RPS to take into account many of the other differences among persons that often matter greatly in our society. Despite the major cultural and legal developments that have taken place in the last few decades, including passage of the Americans With Disabilities Act in 1990,[32] the *Restatement (Third)* has not altered the RPS for persons with emotional or mental disabilities, flatly stating that "[a]n actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child."[33] Similarly, old age in and of itself is not taken into account when assessing the negligence of an elderly party's conduct.[34]

This disparate treatment of physical and mental disabilities has long been controversial, and the controversy is only heightened by the movement for parity of treatment of mental and physical disabilities in other areas of law.[35] Any attempt to justify the disparity requires analysis of the underlying reasons for modifying the RPS with respect to children and persons with physical disabilities, as compared to the situation of persons with mental disorders. At first blush, it seems that in all three instances, members in the group, through no fault of their own, arguably lack the capacity or ability to conform their conduct to the objective RPS. Thus, both children and persons with mental or emotional disabilities may be incapable of exercising reasonable judgment in gauging the existence or severity of a risk, and persons with physical disabilities may be incapable of negotiating the dangers of a particular physical risk. Recognizing this crucial similarity, the *Restatement (Third)* shifts ground and defends the courts' refusal to take into account a person's mental disorders on the basis of "administrability" and "causal connection."[36] The commentary asserts that with respect to limited or moderate mental disorders, a mental disability is ordinarily not "especially important as an explanation for conduct."[37] It also expresses concern for the administrative difficulty in identifying the wide range of moderate mental

[31] *See* Anita Bernstein, *The Communities that Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 739 (2002) (stating that commentators agree that children and the disabled are treated more leniently than the RPS demands).

[32] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006).

[33] RESTATEMENT (THIRD) § 11(c).

[34] *Id.* § 11 cmt. c. If old age is affiliated with a particular physical disability, however, the fact finder is allowed to consider the physical disability, just as in the case of younger persons with physical disabilities.

[35] *See, e.g.*, Jane Byeff Korn, *Crazy (Mental Illness Under the ADA)*, 36 U. MICH. J.L. REFORM 585 (2002); John W. Parry, *Health and Long-Term Disability Insurance for Persons with Mental Disabilities*, 34 MENTAL & PHYSICAL DISABILITY L. REP. 166 (2010); Lorraine Schmall, *One Step Closer to Mental Health Parity*, 9 NEV. L.J. 646 (2009).

[36] RESTATEMENT (THIRD) § 11 cmt. e.

[37] *Id.*

disorders and assessing their significance.[38] With respect to those persons whose mental disorder, such as psychosis, is so severe as to make it likely that they would pose a serious danger, the *Restatement (Third)* commentary bluntly makes the policy argument that "there can be doubts as to whether the person should be allowed to engage in the normal range of society's activities."[39]

Despite the courts' refusals to modify the RPS in cases of mental disability, the main justification for departing from the objective RPS in tort law continues to be recognized differences in capacity or ability. It is significant that the authorized modifications of the RPS for persons with physical disabilities and for children, for the most part, revolve around such differences, rather than differences in perspective, social position, values, or prevailing customs associated with the particular social group.[40] With respect to negligence liability for physical harm, this emphasis on capacity or ability is understandable, given the central role that it plays in allowing persons to act safely and prudently to evaluate and respond to physical risks. Therefore, it is not surprising that most attention has been paid to those personal characteristics that are most likely to affect a person's ability to take the precautions required to guard against risks to their own physical safety and the safety of others. Overall, the new *Restatement (Third)'s* provisions on the RPS suggest that a modification is in order only in very limited instances, and endorse the objective standard absent a clear difference in abilities or capacities.

The unwillingness of courts to go beyond the narrow exceptions to the objective RPS goes a long way toward explaining why differences in gender, race, or other socially relevant differences have not been considered good candidates for a modification of the RPS. Nowadays, we tend to dispute the validity of essential or biologically-based gender differences that would be most relevant to physical safety. Women are not worse drivers than men,[41] for example, and women now have the opportunity to gain experience in risky activities so as to make it seem unjustified to apply a lesser "women only" standard to female defendants. The same proposition holds true with respect to racial groups: Race bears no correlation to safety-related conduct and has no effect on a person's ability to exercise prudent judgment. Coupled with the cultural and legal

[38] *Id.*

[39] *Id.*

[40] The *Restatement (Third)* was adopted before the publication of *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*, which argues that the child standard implicitly subsidizes a "boys will be boys" standard of care that has often excused reckless behavior by male defendants. *See* MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 58 (2003).

[41] In fact, until age 60, women are involved in fewer automobile crashes than men, suggesting to one researcher that, as a group, women "make safer driving choices" than men. Gary T. Schwartz, *Feminist Approaches to Tort Law*, 2 THEORETICAL INQUIRIES L. 175, 188 (2001).

disinclination to apply separate race-based or gender-based standards, it is thus not surprising that tort law has never formally endorsed a "reasonable woman" or "reasonable black person" standard of care in physical harm cases.

III. MULTIPLE PERSPECTIVES AND PERSPECTIVAL STANDARDS

Despite its accepted status within tort law, the objective RPS goes against the grain of a large body of interdisciplinary and critical scholarship that has long disputed the concept of objectivity and theorized about the importance of perspective. The starting point for much of this scholarship is that there are many different ways of seeing the world and that, in a sense, each of us is a biased observer who sees the world only from his or her own perspective.[42] Difficulty arises, however, because people rarely acknowledge the partiality of their own perspective. Instead, it is common for the observer to regard his or her perceptions as objectively accurate and to ignore the perspective of others. Accordingly, many scholars have chosen to investigate the relationship between knowledge and power and expressed skepticism about claims of objectivity and neutrality and about those statements that purport to have universal applicability.[43] The take-home message of much of this work is that frequently what passes for the whole truth is instead a representation of events from the perspective of those who possess the power to have their version of reality accepted.[44] As Michael Selmi summarizes this body of work, "[i]n the best tradition of critical theory, the scholarly literature has demonstrated that there is no neutral baseline from which we can evaluate social experience. Rather, our baselines are invariably shaped by our experiences."[45]

Critical legal scholars have pointed out that actors in the legal system are not immune from the potential for bias produced by partial perspectives and have no special access to the truth. Interdisciplinary legal scholar Martha Minow, for example, observed that the problem is most acute when judges are forced to confront the situation of "someone they think is very much unlike themselves."[46] In such cases, she sees a risk that judges "will not only view that person's plight from their own vantage point but also fail to imagine that there might be another vantage point."[47] To counteract this tendency, it is necessary to extend

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[42] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 60 (1990).

[43] *Id.* at 60; Michael Selmi, Comment, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 661 (2003).

[44] MINOW, *supra* note 42, at 60 ("The ideal of objectivity itself suppresses the coincidence between the viewpoints of the majority and what is commonly understood to be objective or unbiased.").

[45] Selmi, *supra* note 43, at 661 (footnote omitted).

[46] MINOW, *supra* note 42, at 66.

[47] *Id.*

one's limited perspective and to search out and try to understand the perspective of others.[48] Particularly given the relative lack of representation of women and minorities on the bench,[49] one major concern is that there are bound to be gaps in understanding between judges and litigants, which could result in adverse judgments for underrepresented groups. It is true that juries are more diverse and representative of the general population and can bring their differing perspectives to bear in deciding cases.[50] This ameliorating factor is activated, however, only if cases are sent to the jury and are not decided on legal grounds by the judge alone.

As a practical matter, taking steps to incorporate diverse perspectives emerges as most important in contexts in which the distinctive experiences of subordinate groups are at the heart of a legal claim. Thus, when a female plaintiff pursues a tort claim arising out of a physician's negligence in causing a miscarriage,[51] it is particularly important that the court understand the experience of pregnancy, the possible harms that may flow from severing or damaging a mother's connection to her unborn child, and the importance of procreative choice in the lives of women. Similarly, when a minority plaintiff complains of racial harassment on the job and sues for damages under an intentional tort theory,[52] it is crucial that the court appreciate the impact of the harassing conduct from the victim's perspective, in light of the historical position of minorities in that organization and their likelihood of encountering

[48] *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 881 (1990) ("Because knowledge arises within social contexts and in multiple forms, the key to increasing knowledge lies in the effort to extend one's limited perspective.").

[49] In 2010, 264 out of 1277 federal judges (20.51%) were women. *See Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/judges.html. In 2010, 8.86% of the federal judiciary was African-American, 5.59% was Hispanic/Latino, and 1.01% was Asian-American. *Id.* In 2010, 4521 out of 17,108 (26%) state court judges were women. *2010 Representation of United States State Court Women Judges*, NAT'L ASS'N OF WOMEN JUDGES, http://www.nawj.org/us_state_court_statistics_2010.asp. In 2010, 5.9% of state court judges were African-American, 2.8% were Latino, 1.1% were Asian-American. AM. BAR ASS'N, NATIONAL DATABASE ON JUDICIAL DIVERSITY IN STATE COURTS (June 16, 2010), http://www.abanet.org/abanet/jd/display/national.cfm.

[50] *See* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325 n.3 (1995) (citing 1991 study of eight major cities indicating that women comprised an average of 52.875% of serving jurors in federal courts and 53.75% in state courts); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 712 (2007) ("Juries are likely to be far more diverse and bring a broader range of perspectives to bear on the problem."). Racial diversity is much more varied, with African-American representation in Washington, D.C. reaching as high as 65% in state courts and 73% in federal courts, but as low as 3% in both state and federal courts in Boston, and 3% in federal courts in Seattle. *Id.* (citing JANICE T. MUNSTERMAN ET AL., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE D-1 (1991)).

[51] *See, e.g.*, Broadnax v. Gonzales, 809 N.E.2d 645, 649 (N.Y. 2004).

[52] *See, e.g.*, Walker v. Thompson, 214 F.3d 615, 624 (5th Cir. 2000).

similar harassment in the future. It is in these gender-related and race-related contexts that assessments of reasonableness are most likely to turn on experience and where cultural differences arguably matter the most.[53]

In addition to support from critical theory, a strong argument for recognition of diverse perspectives comes from empirical social science research that has begun to document how cultural subgroups see the world differently. Starting in the 1980s, for example, gender bias task forces studying the existence and impacts of gender bias in the judicial system documented what has become known as the "two worlds" phenomenon.[54] Based largely on surveys and focus group interviews of lawyers and judges, the task forces determined that men and women often had very different views as to the definition and the prevalence of gender bias.[55] For example, when asked about gender bias, men tended to respond that there was no problem, while women far more often reported that gender bias was a frequent problem.[56] The most extensive study, conducted by the Ninth Circuit Gender Bias Task Force, determined that differing perspectives accounted for much of this gender disparity, noting that "when witnessing or engaging in the very same behaviors, women and men experience, describe, and report different events."[57] Significantly, the task force focused on those gender-related courtroom interactions and behaviors of employees in the judicial system that the respondents considered to be offensive, disparaging, or discriminatory.[58] At least when it came to matters of gender bias, men and women appeared to inhabit different worlds and to judge reality quite differently.

A similar divide can be found in the perspectives of African-Americans and whites in matters relating to race discrimination.[59] There is now an extensive literature on subtle or unconscious racial bias documenting how African-Americans define racial bias more broadly than whites and how such perceptions influence the manner in which

[53] *See* Schneider, *supra* note 50, at 706 (discussing importance of the gender of the decision-maker in sex discrimination cases).

[54] For a summary of the findings of more than 40 task force reports on gender, race and ethnicity, see Judith Resnik, *Gender Matters, Race Matters*, 14 N.Y.L. SCH. J. HUM. RTS. 219, 225–30 (1997).

[55] *Id.* at 229–30.

[56] *Id.*

[57] John C. Coughenour et al., *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Taskforce*, 67 S. CAL. L. REV. 745, 950–51 (1994).

[58] *Id.* at 763.

[59] For data on the "two worlds" phenomenon as it relates to race and ethnicity in courts and law firms, see MICH. SUP. CT. TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS, FINAL REPORT 13 (1989) (describing "majority males" as the least likely to perceive racial bias).

blacks respond to behavior perceived as discriminatory.[60] The scholarship emphasizes the legacy of slavery and segregation, explaining that it lives on in contemporary black stereotypes of "incompetence, occupational instability, primitive morality, and similar derogatory perceptions,"[61] and in the use of "code words,"[62] and "acts of disregard"[63] that convey a meaning of black inferiority to their target audience. Because whites often deny harboring racist intentions in such encounters,[64] the "two worlds" phenomenon has become linked to the concept of unconscious racism and is often at the heart of controversies over the meaning and prevalence of race discrimination in everyday life.

Undoubtedly, the most well-documented instance of the "two worlds" phenomenon comes from the social science research on workplace sexual harassment.[65] A large number of studies have found gender differences in the way men and women interpret sexualized conduct on the job. One consistent finding is that, as a rule, women tend to perceive such behavior as more offensive than men and are more likely to label the behavior sexual harassment.[66] Particularly with respect to hostile environment harassment, women are also more likely than men to perceive the conduct in a negative way and to conclude that it had a harmful effect on the target.[67] Not surprisingly, these gender differences are most likely to surface in ambiguous cases where there is room for argument. In such cases, perspective can make a difference in result, prompting one author to conclude that the differences found

[60] *See* JENNIFER L. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION 57 (1995) ("[W]hites see little and lessening discrimination, and blacks feel themselves to be the objects of a lot, even increasing amounts, of discrimination."); LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 54–66 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490 (2005); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 535 (2003); Lawrence D. Bobo, Michael C. Dawson & Devon Johnson, *Enduring Two-Ness—Through the Eyes of Black America*, PUB. PERSP. May–June 2001, at 13, 15, *available at* http://webapps.ropercenter.uconn.edu/ppscan/123%5C123012.pdf (one-third of whites believe that blacks have achieved equality, versus fewer than one-tenth of blacks).

[61] Smith, *supra* note 60, at 537.

[62] *See* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082–83 (3d Cir. 1996) (mentioning racial code words). *See also* Frank Rudy Cooper, *When Machismo Meets Post-Racialism: The Gates Controversy*, 63 (Suffolk University Law School Legal Studies Research Paper Series, Research Paper 10-16, 2010), *available at* http://ssrn.com/abstract=1576751 (discussing coded appeals to racial stereotypes).

[63] Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1576 (1989).

[64] *See* Cooper, *supra* note 62, at 64 (describing coded appeals to stereotypes as not being considered racist); Smith, *supra* note 60, at 537–38.

[65] For an excellent summary of the social science research, see Elizabeth L. Schoenfelt, Allison E. Maue & JoAnn Nelson, *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 633, 647–51 (2002).

[66] *Id.* at 648.

[67] *Id.* at 649.

between the sexes is the most salient characteristic in determining what constitutes sexual harassment.[68]

Scholars are careful to point out that these gender differences do not stem from any inherent or biological difference in the way men and women approach sex, but are rather a product of differing experiences and social positions. Social psychologist Barbara Gutek explains, for example, that the differing responses to sexual harassment by men and women reflects each group's self interest: "It is in men's self-interest to see relatively little sexual harassment because men are most often the offenders whereas it is in women's self-interest to see relatively more sexual harassment because women tend to be the victims in sexual harassment encounters."[69] It is noteworthy that women's perceptions are formed against a backdrop of a higher frequency of rape and sexual assault for their gender group. This awareness has made women wary of even milder forms of sexual harassment, which are often perceived as threatening and as a prelude to sexual assault.[70] This well-documented gender differential in perception of risks associated with sexualized conduct in the workplace has provided the most compelling argument to date for adoption of perspectival standards in the law in order to respond to the core concern that a "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[71]

More recent psychological research has complicated the picture beyond the "two worlds" phenomenon and has delved, with more precision, into the mix of factors that produce perceptual divides in our society. One potentially important finding for tort law comes from experiments done by cognitive and social psychologists who found that individuals selectively credit and dismiss dangers in a manner supportive of their cultural identities.[72] In this vein of scholarship, a person's cultural world view interacts with gender and race to influence how the person evaluates risks.[73] Thus, whether a person holds egalitarian values and places a high importance on social solidarity—as opposed to holding individualistic values and placing a high importance on hierarchy—is a crucial factor in understanding that person's orientation toward risk.

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[68] John B. Pryor, *The Lay Person's Understanding of Sexual Harassment*, 13 SEX ROLES 273, 276 (1985).

[69] Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 343 (1992).

[70] *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1204–05 (1989).

[71] Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

[72] *See* Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465 (2007).

[73] *Id.*

In a dramatic study that *The New York Times* credited with being one of the notable ideas of 2009,[74] Dan Kahan, David Hoffman and Donald Braman tested this theory of "cultural cognition of risk."[75] In particular, they surveyed how people responded to the dangers presented by the following scenario: a high-speed chase of a speeding motorist, which ended when the police deliberately rammed the fleeing car after the motorist refused to pull over. The resulting crash was serious, with the motorist rendered quadriplegic from his injuries.[76] The experiment was drawn from an actual U.S. Supreme Court case in which the Court, with only one dissent, determined that the chase was justified because of the deadly risk the fleeing motorist posed to the public.[77] In determining that it was proper to take the case from the jury because "no reasonable jury" could judge the case otherwise, the Court was influenced by its own viewing of a video of the chase filmed from inside the police cruiser.[78] In these unusual circumstances, the Supreme Court justices had the rare opportunity to gauge the relevant risk with their own eyes. The majority then declared that its perception of the risk was the only reasonable one under the circumstances.[79]

One significant finding of the study was that the Court's perception of the obvious risks posed to the public by the fleeing motorist was not shared equally by all the groups surveyed. Although a sizeable majority of the respondents did indeed interpret the facts the way the Court did, members of various subcommunities did not. Significantly, the authors reported that "African Americans, low-income workers, and residents of the Northeast . . . tended to form more pro-plaintiff views of the facts than did the Court. So did individuals who characterized themselves as liberals and Democrats."[80] These pro-plaintiff respondents fit a recognizable cultural profile, characterized by egalitarian values and an emphasis on social solidarity. In interpreting the facts, these respondents tended to see less danger in the motorist's flight, to attribute more responsibility to the police for creating the risk, and to find less justification in the use of deadly force to end the chase.[81] According to the authors of the study, the very existence of a recognizable minority viewpoint signaled a cultural conflict that might better be filtered through and debated by a jury, rather than evaluated by the judge

[74] Christopher Shea, *Cognitive Illiberalism*, N.Y. TIMES, Dec. 13, 2009 (Magazine), at 30.

[75] Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 852 (2009).

[76] *Id.* at 854–55.

[77] Scott v. Harris, 127 S. Ct. 1769, 1779 (2007).

[78] *Id.* at 1775–76.

[79] *Id.* at 1776.

[80] Kahan, Hoffman & Braman, *supra* note 75, at 841.

[81] *Id.*

alone.[82] The lesson the authors derived from their study is that judges should exercise caution and a measure of humility before deciding certain cases summarily, particularly those cases in which there are likely to be "culturally polarized understandings of fact."[83]

Even the above thumbnail sketch of the growing research on multiple perspectives suggests that it is now sufficiently well developed to pose a challenge to the objective RPS. However, this mounting evidence that gender, race, and other cultural factors shape our perceptions of risk does not necessarily point to an easy fix for the inadequacies of the objective RPS. As relates to legal doctrine, devising a suitable replacement for objective reasonableness has proved to be difficult and controversial, even among feminist and critical scholars.[84]

The debate with respect to Title VII sexual harassment law is the most instructive for our purposes.[85] Starting in the early 1990s, some courts were persuaded by feminist arguments that the harmful quality of harassing conduct ought to be judged from the victim's or target's point of view,[86] instead of relying on the non-situated reasonable person standard. Although none of these courts was willing to rely on the subjective perception of an individual plaintiff,[87] some did endorse a "reasonable woman" standard or "reasonable victim" standard in order to avoid minimizing the harm of sexual harassment and to capture the full nature and extent of plaintiff's sexualized injury.[88]

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[82] *Id.* at 901.

[83] *Id.* at 900. *See also* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance Rape Cases*, 158 U. PA. L. REV. 729, 729 (2010) (persons with a "hierarchical worldview" more likely to believe that a woman consented to sex in acquaintance rape scenario than persons with an "egalitarian worldview").

[84] *See* Schoenfelt, Maue & Nelson, *supra* note 65, at 638.

[85] For discussions of perspectival standards in sexual harassment law, see MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 90–92, 242–45 (2d ed. 2003); CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN (2000).

[86] Courts often use the terms "reasonable woman" and "reasonable victim" interchangeably. *See* Schoenfelt, Maue & Nelson, *supra* note 65, at 638–39. For a discussion of the complexities of using a modified standard in cases of male victims, see Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 124 (1992).

[87] *See* Andrews v. City of Phila., 895 F.2d 1469, 1483 (3d Cir. 1990) ("The objective standard protects the employer from the 'hypersensitive' employee.").

[88] *See, e.g.*, McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004) (applying perspective of the reasonable person belonging to the racial or ethnic group of the plaintiff); Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (applying reasonable woman standard); Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1516 (D. Me.), *vacated in part*, 765 F. Supp. 1529, 1532 (D. Me. 1991) (applying reasonable black person standard); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991); Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 448 (N.J. 1993) (adopting a reasonable woman standard under the New Jersey Law Against Discrimination). A powerful early defense of the reasonable woman standard can be

At first, it seemed that the U.S. Supreme Court would abruptly shut down this move away from objectivity when it declared in 1993 that the touchstone for determining whether a working environment was sexually hostile was whether "a reasonable person would find [it] hostile or abusive."[89] Soon thereafter, however, the Court signaled that it was not averse to considering multiple perspectives in such cases, although it refused to abandon the reasonable person standard.[90] Instead, the Court hinted at ways of enlarging the concept of the reasonable person to take into account the social position of both the harasser and the target when courts and juries assess the seriousness of challenged behavior.[91] Thus, in a 1998 same-sex harassment case, the Court instructed that harassment should be judged "from the perspective of a *reasonable person in the plaintiff's position*, considering 'all the circumstances.' . . . [including] the social context in which particular behavior occurs and is experienced by its target."[92] Additionally, in 2006, the Court ruled that the governing standard in sex-based retaliation cases was that of a "*reasonable person in the plaintiff's position*," expressly noting that the plaintiff in the case was the only woman in her department.[93] This prompted a concurring justice to assert that the Court's standard would require consideration of some of the plaintiff's individual characteristics—including "age, gender, and family responsibilities"—to judge the case from a person in the plaintiff's position.[94] It is still not entirely clear, however, whether it is proper to instruct a jury that it may take into account a plaintiff's sex in deciding whether a plaintiff's response to defendant's conduct was reasonable.

In sum, although the U.S. Supreme Court seemingly rejected the "reasonable woman" standard in *Harris*, it nevertheless opened the door to consideration of diverse perspectives in sexual harassment cases. I read the subtle but telling difference between the reasonable woman standard and the formulations approved by the Court as primarily a difference in the weighting of diverse perspectives: Although the Court seems willing to allow alternative perspectives to be taken into account, it is nevertheless unwilling to declare that those perspectives should govern.[95]

found in the dissenting opinion of Judge Damon Keith in Rabidue v. Osceola Ref. Co., 805 F.2d 611, 627–28 (6th Cir. 1986).

[89] Harris v. Forklift Sys,. Inc., 510 U.S. 17 (1993).

[90] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

[91] *Id.*

[92] *Id.* (emphasis added).

[93] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69–70 (2006) (emphasis added).

[94] *Id.* at 79 (Alito, J., concurring in the judgment).

[95] *Cf.* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (March 19, 1990), http://www.eeoc.gov/policy/docs/currentissues.html ("The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior.").

This cautious and somewhat ambivalent approach to infusing perspective into Title VII civil rights law mirrors the lukewarm reception given to the reasonable woman standard in the scholarly literature. Early on, feminist critics of the reasonable woman standard expressed concerns that modifying the standard was no cure for possible sexist applications of any revised standard.[96] They worried that judges and juries could continue to pour traditional gender stereotypes into the new standard by simply assuming that a reasonable woman would embrace customary (and often inegalitarian) views about sexual conduct and gender relations.[97] If this occurred, the new reasonable woman standard might end up reinforcing gender inequality, rather than challenging it, particularly if the mere existence of separate gender standards signaled that there were natural differences between the sexes that the law ought to take into account. A related concern was that, as applied, the reasonable woman standard would be prone to the dangers of gender essentialism.[98] The fear was that the search for the viewpoint of the reasonable woman might collapse into a futile search for a consensus viewpoint among women, with the result that the values of the more dominant members of the group—namely, white, affluent, heterosexual women—would be misconstrued as representative of the whole.[99] Despite attempts by scholars to reconstruct the content of the reasonable woman standard along feminist lines,[100] misgivings about adopting the reasonable woman standard persisted, even in the face of a growing appreciation for the "multiple perspectives" account of social reality.[101]

Coupled with these theoretical objections, there are lingering doubts about whether such a minor change in the wording of the standard would make any significant difference in the outcome of cases.[102] The limited empirical evidence suggests that it would not.[103] One experimental study of undergraduates' reactions to sexual harassment scenarios, for example, found that a change in the standard used (from reasonable person to reasonable woman) did not affect the respondents' assessment of sexual harassment, although women expressed more

[96] *See* CHAMALLAS, *supra* note 85, at 245.

[97] *See* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 63–64 (1989).

[98] *See* CHAMALLAS, *supra* note 85, at 91–92.

[99] *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1218 (1990).

[100] *See* Chamallas, *supra* note 86, at 96; Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, DISSENT, 48, 50–51 (Winter 1995); Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151, 1157 (1995).

[101] *See* Schoenfelt, Maue & Nelson, *supra* note 65, at 669.

[102] *See* Nicole Newman, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 554 (2007).

[103] *See* Schoenfelt, Maue & Nelson, *supra* note 65, at 669; Newman, *supra* note 102, at 554–55.

confidence in their finding of sexual harassment under the reasonable woman standard.[104] Another study measuring the reactions of both college students and adults to detailed case studies of harassment suits likewise found that the legal standard chosen had only very small effects on people's judgment of sexual harassment.[105] Similarly, in a recent experimental study of responses to acquaintance rape scenarios modeled after the famous case of *Commonwealth v. Berkowitz*,[106] Dan Kahan's team of cultural cognition researchers found that differences in the wording of legal definitions of rape did not significantly affect the subjects' willingness to convict.[107]

In actual litigation, moreover, where the jurors can see the parties for themselves, it is doubtful that any particular formulation of the legal standard will control their assessment of the significance of gender in deciding the merits of the case. There is thus a "tempest in a teapot" quality to the debate over the reasonable woman standard that threatens to eclipse the larger objective of purging sexism from existing legal standards and changing the law in an egalitarian direction that does not submerge women's perspectives on matters of sexual abuse and harassment.

Compared with civil rights law, there has been less debate in tort law about modifying the objective RPS standard to incorporate differing gender perspectives and little pressure to adopt a reasonable woman standard.[108] As discussed in Part II, in contrast to Title VII cases, contemporary courts in torts cases have not tinkered with the formulation of the objective RPS to authorize gender to be taken into consideration from the perspective of a "reasonable person in plaintiff's position" or as part of the social context.[109] Additionally, feminist torts scholarship has not generally identified revision of the reasonable person standard as a top priority for producing egalitarian reform, but rather has fixed its attention on other topics.[110]

In an early groundbreaking essay critiquing sexism in tort law, Leslie Bender did attack the RPS as historically infected by male bias, asserting that it embraced "the perspective of a male judge, lawyer, or law professor, or even a female lawyer trained to be 'the same as' a male

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[104] *See* Schoenfelt, Maue & Nelson, *supra* note 65, at 665.

[105] *See* Barbara A. Gutek et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y & L. 596, 623 (1999).

[106] 641 A.2d 1161 (Pa. 1994).

[107] Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 733 (2010).

[108] *See supra* notes 85–95 and accompanying text (discussing critique of RPS in statutory civil rights law).

[109] *See supra* at notes 29–41 and accompanying text.

[110] For discussions of feminist and critical torts scholarship in the United States, see Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); and CHAMALLAS & WRIGGINS, *supra* note 5, at 30–34 (2010).

lawyer."[111] Notably, however, she did not recommend adopting a reasonable woman standard, but argued instead for re-fashioning the RPS along cultural feminist lines to require individuals to display the heightened level of care or concern they would take for a "neighbor" or "social acquaintance" rather than a stranger.[112]

Later feminist torts scholarship has been more nuanced and less confident of sex bias in the application of the objective RPS. For example, Margo Schlanger's historical study of three sets of negligence cases from 1860 to 1930 concluded that rather than ignoring gender and setting the standard of care exclusively on male experience, many courts took the gender of the parties into account as an important factor in making determinations of reasonableness, with mixed and complicated results.[113] She uncovered many older cases in which courts seemed to apply a gender-specific standard of care that facilitated recovery for female plaintiffs.[114] However, resorting to a gender-specified standard could also operate as a barrier to recovery and reinforce disparaging stereotypes about women as incompetent and less physically agile than men.[115] In asserting contributory negligence defenses, for example, some litigants argued that women ought to be required to exercise extra care in light of their presumed fragility.[116] Overall, Schlanger's research provides little support either for retaining the objective RPS or for moving to the reasonable woman standard. Instead, it lends historical grounding for the empirical studies, mentioned above,[117] that have concluded that the precise formulation of the standard of care has little effect on decision-making.

It would be a mistake, however, to interpret the lack of enthusiasm for modifying the objective RPS in tort law as a complete rejection of the "multiple perspectives" critique of objectivity. Perhaps because of its familiarity and visibility, the RPS is often thought of as the obvious point of entry for feminist and critical interventions into tort law.[118] However, in

[111] Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 23 (1988). *See also* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 57–65 (1989).

[112] Bender, *Feminist Theory and Tort*, *supra* note 111, at 25.

[113] Margo Schlanger, *Injured Women Before Common Law Courts, 1860–1930*, 21 HARV. WOMEN'S L.J. 79 (1998) [hereinafter Schlanger, *Injured Women*].

[114] *Id.*

[115] *Id.* at 84–85. *See also* BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION 1865–1920 177 (2001) (describing how women's injuries encouraged courts to expand protection, while reinforcing prevailing stereotypes of white women as fragile and emotional).

[116] Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769, 775–78 (2001) ("a 'reasonable woman' standard, notwithstanding its rhetorical appeal, frequently enforces as well as reflects a masculine vision of female dependence and fragility.").

[117] *See supra* notes 102–06 and accompanying text.

[118] *See* CHAMALLAS & WRIGGINS, *supra* note 5, at 31 (discussing critical torts scholarship).

the United States, the "action" has been elsewhere, away from standard of care, and instead centered around contentious debates over duty, particularly in specific gender-related and race-related contexts.[119] The next Part analyzes cases of third-party criminal attacks as a prime example of such a clash of perspectives.

IV. THIRD-PARTY CRIMINAL ATTACK CASES

As discussed in Part II, neither modifications for gender or race, nor consideration of multiple perspectives have found their way into negligence doctrine governing the formulation of the standard of care in physical injury cases.[120] In one important subset of cases known as "third-party" criminal attack cases, however, courts have been forced to make determinations of duty and reasonable care that frequently bear on the gender, race, or economic status of the victims.[121] To be sure, courts and commentators have not drawn an explicit connection between the duty controversies in these cases and the debate about multiple perspectives. But they do share an important common theme: They each implicate the fundamental question of determining the level of protection required by law when vulnerable groups are disproportionately exposed to injuries and risks.[122]

In third-party criminal attack cases, a key underlying issue is whether the norm of reasonable care should be set at a level that provides equal safety for women and for residents of high-crime neighborhoods. This is the kind of contested issue likely to expose diverse perspectives and "culturally polarized understandings of fact."[123] Although framed in abstract, neutral terms,[124] the doctrinal debate over whether to impose a duty to exercise reasonable care and, importantly, whether a jury will be given authority to decide the case,[125] has significant consequences for victims of assault who have an interest in having their perspectives considered and understood by legal decision makers. Getting to the jury in such cases increases the chances that "someone like them" will have a role in decision making and that diverse perspectives in controversial contexts will not be excluded.

A. Duty and Third-Party Rape and Sexual Assault Cases

Third-party criminal attack cases present difficult issues of duty that are not present when a rape or other crime victim sues the assailant

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[119] *Id.* at 89–117 (discussing duty in gender and race-related contexts).

[120] *See supra* notes 29–41 and accompanying text.

[121] *See infra* notes 151–82, 208–14, 233–51 and accompanying text.

[122] *See infra* notes 293–94 and accompanying text.

[123] Kahan, Hoffman & Braman, *supra* note 75, at 900.

[124] *See infra* notes 139–44 and accompanying text.

[125] *See infra* notes 187–97 and accompanying text.

directly. In such direct cases, the plaintiff frequently asserts an intentional tort, such as battery or assault,[126] and there is no question that the assailant owes a duty to refrain from intentionally injuring the plaintiff. In third-party cases, however, the underlying claim is one of negligence, not intentional harm: The crux of the case against the defendant is the failure to exercise reasonable care to prevent the rape or attack and thus hinges on defendant's role in facilitating an avoidable injury. Defendants in these third-party cases are frequently institutional actors, such as landlords, businesses, schools, and other entities who routinely make cost/benefit decisions about the level of safety and security they will provide to their customers, tenants, employees, and members of the general public.[127] In the aggregate, their decisions about whether to invest in safety have systemic effects on rates of crime, quality of neighborhoods, and choices available to affected citizens.

Although third-party defendants are commonly viewed as less morally culpable than assailants, they are frequently the primary target of civil actions.[128] Ellen Bublick conducted an empirical study of civil sexual assault cases, which found that the number of civil cases brought by sexual assault victims had increased dramatically in the last 30 years and that the "vast majority" of cases at the appellate level involved at least some claims against a third-party defendant.[129] This shift toward suing third parties has been so prominent that Bublick described it as "an evolution in the very nature of the litigation itself."[130] There are multiple reasons for the shift, including, of course, the greater likelihood of collecting a judgment from an institutional third-party than from a criminal assailant.[131] Most importantly, for our purposes, a shift in cultural attitudes has taken place that has also made suing third-parties for failing to prevent rapes and sexual assault seem reasonable and appropriate. Bublick expressed the view that changes in gender roles and sex-related norms, including the movement for rape reform, contributed to the "contemporary case law's intrinsic sense that private parties should play a role in curtailing sexual assault."[132] This sense that responsibility for sexual assaults should not be limited to criminal assailants marks a significant change in causal attribution which has considerable potential to steer tort law in an egalitarian direction.

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[126] *See, e.g.*, Williams v. Moore, 36 So. 3d 1214 (La. Ct. App. 2010) (discussing a bar fight that resulted in intentional tort action against the attackers).

[127] *See infra* notes 151–82, 233–51 and accompanying text.

[128] *See* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 61 (2006).

[129] *Id.* at 58–61.

[130] *Id.* at 61.

[131] *Id.* at 90–105. Private parties, rather than public entities, are more likely to be sued in third-party rape cases. The prospects of securing a tort award against public authorities for injuries caused by inadequate policing are very slim, due to immunity and other special doctrines which broadly protect public entities from liability.

[132] *Id.* at 62.

As might be expected given the contested values at stake, the legal doctrine with respect to third-party criminal attack cases is currently in a state of confusion. An article co-authored by one of the Reporters of the *Restatement (Third)* notes that in this area, "[c]ourts say and do things that seem wildly inconsistent."[133] Perhaps the only clear trend is one of conceptualization. In contrast to earlier times, the problem of intervening criminal acts is now largely regarded as a problem of duty, rather than of proximate cause.[134] In the past, the general rule was that intervening criminal conduct severed the causal chain, resulting in no proximate cause as a matter of law.[135] Contemporary courts are far less likely to rely on proximate cause and to rule that the sexual assault or other criminal act severs the causal chain.[136] Instead, the fight is now over duty with no clear direction in the case law.[137] As prominent treatise writer Dan Dobbs sums up the current state of the law, "there is no blanket duty any more than there is a blanket immunity."[138]

It is important to point out that the doctrine governing third-party criminal attack cases draws no formal distinction between rape and sexual assault cases on the one hand, and cases involving other types of criminal attacks on the other hand. Nevertheless, in sexual assault cases, some courts have regarded gender as an appropriate factor to consider in determining whether to impose a duty of reasonable care and have begun to articulate a concept of reasonable care that contemplates an equal level of safety for both sexes.[139] Although not expressed in so many words, there appears to be sense on the part of these courts that tort law requires that premises be made reasonably safe for women as well as men and that, in making safety decisions, it is unreasonable to ignore women's disproportionate vulnerability to sexual assault.

Recent premises liability cases brought against owners of residential and commercial property for injuries sustained as a result of criminal attacks most vividly demonstrate this point. In reflecting on the increasing willingness of courts to impose a duty in the premises liability context, Dan Dobbs took notice of the gender-marked character of the cases and observed that "many courts have now imposed a duty of reasonable care to maintain the physical condition of the premises so as to minimize the risk of assaults and robberies, which often involve rapes and killings of women or sexual molestation of children."[140] In these cases, courts consider the gender of victims to decide whether the

[133] W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008).

[134] *See* DAN B. DOBBS, THE LAW OF TORTS 474 (2000).

[135] *Id.*

[136] *Id.*

[137] *See* Cardi & Green, *supra* note 133, at 671.

[138] DOBBS, *supra* note 134, at 474.

[139] *See infra* notes 148–56 and accompanying text.

[140] DOBBS, *supra* note 134, at 880–81 (footnote omitted).

defendant should have foreseen the attacks and whether the defendant's unreasonable failure to take precautions warrants submitting the case to the jury.[141]

One notable opinion highlighting the gender of the plaintiff was *L.A.C. v. Ward Parkway Shopping Center Co.*,[142] a 2002 case involving the rape of a 12-year-old girl in a shopping mall in Kansas City. The rape was committed by a 15-year-old boy who grabbed the plaintiff's purse and ran off with it into the hallway. She followed him, demanded her purse back, and then agreed to kiss him in order to get her property back. Shortly thereafter, he grabbed her, carried her away screaming, and raped her on the catwalk, a walkway connecting the mall to the parking lot. Although her friend reported the incident to security guards, they did nothing, saying that they believed the young man was "just playing."[143]

Reversing a summary judgment in favor of the defendant, the Missouri Supreme Court detailed the disproportionate risks faced by women shoppers and the mall owner's responsibility to take measures to cut down on crimes against them.[144] As in most third-party criminal attack cases, one key question in deciding duty was whether the risk of attack—in this case, the risk of rape—was foreseeable.[145] Significantly, in the three years prior to the attack on the plaintiff, there had been only one prior sexual assault at the mall.[146] Although this fact alone would be enough to persuade some courts to find a lack of foreseeability and consequently no duty, the Missouri court elected to consider the history of all violent attacks against shoppers and employees at the mall and to count the number of female victims.[147] By this measure, there were 75 prior violent crimes at the mall and, importantly, 62% of the crimes with identifiable victims were committed against women.[148] A special box in the court's opinion listed 16 of these prior incidents, several of which involved purse snatchings and female victims.[149] This unusual presentation of the facts was designed to drive home a point related to foreseeability and duty, specifically, that "[f]oreseeability does not require identical crimes and identical locations."[150] In a matter-of-fact statement with major implications for third-party rape cases, the court observed that "[v]iolent

[141] *See* L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247, 257–59 (Mo. 2002) (en banc) (reviewing past violence around the shopping center and emphasizing the attacks against women specifically); Gans v. Parkview Plaza P'ship, 571 N.W.2d 261, 269 (Neb. 1997) (mentioning the relevance of the fact that the victims were women).

[142] *L.A.C.*, 75 S.W.3d at 254–56.

[143] *Id.* at 250.

[144] *Id.* at 253–55.

[145] *Id.* at 257.

[146] *Id.* at 253–54.

[147] *Id.* at 258–59.

[148] *Id.*

[149] *Id.* at 254.

[150] *Id.* at 259.

crimes against women, particularly, serve sufficient notice to reasonable individuals that other violent crimes, including sexual assault or rape of women, may occur."[151]

Other courts have likewise dispensed with the necessity of proving that a similar rape or sexual assault had occurred on the defendant's premises before imposing a duty to take reasonable care to prevent an attack. For example, the Nebraska Supreme Court, in *Gans v. Parkview Plaza Partnership*,[152] reversed a summary judgment in a third-party rape case in which a group of four women leased office space for a business. The incident occurred early one evening, when one of the women was working alone. She was beaten and raped by a man who entered the office. Prior to the rape, the tenants had told the owner that they sometimes worked alone at night and repeatedly complained that their office was not safe, particularly because the door to their suite could not be locked from the inside. The owner nevertheless refused to repair the lock, apparently because the locks had been changed two years before when the women had first moved into the suite.[153] In holding that it was error not to submit the case to the jury, the Nebraska court emphasized that the defendant's knowledge was sufficient to put him on notice that a rape or sexual assault might foreseeably occur.[154] In addition to being located at the end of a dead-end street which "presented an easy target for criminal activity," the court thought it important that the defendants had actual knowledge that the lock to the suite could not be operated from the inside and "that women occupied the suite alone at night."[155]

Similarly, in an opinion authored by Ruth Bader Ginsburg when she sat on the D.C. appellate court, the court imposed a duty on a commercial landlord who failed to secure the vacant portions of an office building.[156] The plaintiff, a woman who worked as a secretary in the building, was dragged from the elevator and raped by a man who forced her into one of the unlocked, vacant offices.[157] Even though no prior sexual assaults or crimes against the person had taken place on the premises, the court reasoned that the rape was reasonably foreseeable.[158]

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[151] *Id.*

[152] *See* Gans v. Parkview Plaza P'ship, 571 N.W.2d 261, 264 (Neb. 1997). *See also* Sturbridge Partners, Ltd. v. Walker, 482 S.E.2d 339, 341 (Ga. 1997) (holding that burglaries of vacant apartments are enough to make rape of tenant foreseeable); Walker v. Aderhold Props., Inc., 694 S.E.2d 119, 122 (Ga. Ct. App. 2010) (holding prior burglaries enough to put landlord on notice that rape could foreseeably occur).

[153] *Gans*, 571 N.W.2d at 277.

[154] *Id.* at 269.

[155] *Id.*

[156] Doe v. Dominion Bank of Wash., N.A., 963 F.2d 1552, 1554 (D.C. Cir. 1992). The racial implications of the case are discussed in Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal and Contract Law*, 63 U. CIN. L. REV. 269, 289–94 (1994).

[157] *Dominion Bank of Wash., N.A.*, 963 F.2d at 1554–55.

[158] *Id.* at 1561–62.

For this court, a duty to exercise reasonable care to prevent rape was triggered because the owner was aware of the easy access to vacant areas of the building and had knowledge of prior thefts and other property crimes in the building.[159] Notably, after the rape, the elevators were programmed to bypass vacant floors, and precautions were taken to lock off access to all floors not occupied by tenants.[160]

The more liberal stance toward duty exemplified by the cases just discussed is often associated with endorsement of a "totality of the circumstances" approach which dispenses with proof of prior specific similar crimes as a prerequisite to finding a duty.[161] This contrasts with the more restrictive approaches of some states that have continued to require evidence of prior similar incidents before a duty is imposed,[162] or have adopted a balancing approach that instructs courts to balance the cost of precautions against the foreseeability of harm before imposing a duty.[163] However, each of these standards has proven very malleable and do not always provide a reliable guide to determining when a third-party criminal attack case is likely to be sent to the jury.

Two high-profile rape cases from California are commonly cited as examples of a restrictive approach to duty.[164] They each involved facts that could have alerted the defendants to the potential for rape or sexual assault against women on the premises, similar to the cases imposing a duty discussed above. However, in both cases, the California Supreme Court ruled that the commercial business owners had no obligation to provide security or to take other precautions against the rapes and upheld summary judgments in their favor.

Ann M. v. Pacific Plaza Shopping Center[165] involved a claim against a shopping center for the rape of a woman who was assaulted while she was opening up a 60-minute photo shop. The woman was the only employee on duty at the time when a man, armed with a knife, entered the store, went behind the counter, raped her, and fled before being apprehended.[166] The record indicated that there had been prior criminal

[159] *Id.* at 1562.

[160] *Id.* at 1555.

[161] *See, e.g.*, Monk v. Temple George Assocs., 869 A.2d 179, 188 (Conn. 2005); Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972–73 (Ind. 1999); Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1023 (N.J. 1997).

[162] *See, e.g.*, Willmon v. Wal-Mart Stores, Inc., 143 F.3d 1148, 1150–52 (8th Cir. 1998). A few courts even impose a more highly restrictive standard that requires that the landowner be aware that harm to the plaintiff is imminent. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 483–84 (6th ed. 2009).

[163] *See* Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 767 (La. 1999); McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 898 (Tenn. 1996).

[164] Sharon P. v. Arman, Ltd., 989 P.2d 121 (Cal. 1999); Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207 (Cal. 1993).

[165] *Ann M.*, 863 P.2d at 209–10.

[166] *Id.* at 210.

activity at the shopping center, including robberies, purse snatchings, and a man pulling down women's pants.[167] Tenants of the shopping center, including employees of the photo shop where plaintiff was raped, had voiced complaints about the presence of transients in the area, had reported that they felt threatened by persons loitering in the area, and had called the police on more than one occasion.[168] This showing was insufficient, however, to allow a trial of the case. The California court worried that a ruling for the plaintiff would mean that shopping centers would have to incur high costs in providing security guards, and that such a burden was unfair.[169] Rather than focusing on the risks that a lack of security might entail for female employees, the court lamented that "[u]fortunately, random, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable."[170]

This restrictive stance was reinforced by a later ruling by the California Supreme Court which found no duty in a case in which a woman was raped in an underground parking garage, despite evidence of the dilapidated condition of the garage, broken security cameras, numerous possible hiding places for assailants, and a lack of supervision.[171] Beyond California, other courts have similarly been reluctant to permit juries to hold businesses accountable for failing to take precautionary measures to protect against rape, even if the plaintiff produces evidence that an attack was not entirely unforeseeable, citing unsafe condition of the premises or evidence of prior criminal activity.[172]

The chaotic state of the law has been fueled by the courts' insistence—in liberal and in restrictive states alike—that the existence of a duty turns on whether the criminal activity was foreseeable. As the prior discussion of the restrictive decisions suggests, however, it is highly unlikely that a lack of foreseeability is all that is driving those decisions.[173]

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[167] *Id.*

[168] *Id.*

[169] *Id.* at 215. Commentators have classified the California approach as a "balancing approach" in which specific similar incidents are required to impose a duty if either the risk of attack is low or the cost of safety is high. *See* DOBBS, *supra* note 134, at 878–79. For a discussion of the pro-defendant evolution of California law, *see* Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 472 (1999).

[170] *Ann M.*, 863 P.2d at 215.

[171] Sharon P. v. Arman, Ltd., 989 P.2d 121, 123–33 (Cal. 1999).

[172] *See, e.g.*, Shadday v. Omni Hotels Mgmt. Corp., 477 F.3d 511, 511–18 (7th Cir. 2007) (holding there was no liability to female guest raped in elevator, despite 637 crimes in the immediate neighborhood); Rogers v. Burger King Corp., 82 P.3d 116, 118–22 (Okla. Civ. App. 2003) (holding there was no duty in case in which female employee was abducted from restroom located in remote area late at night and raped).

[173] *See* DOBBS, *supra* note 134, at 474 (holding that courts' rulings are "less about foreseeability itself than about the courts' notion about the appropriate scope of duty, which may turn largely on other matters altogether").

Instead, in many no-duty cases, the defendants had been alerted to concerns about safety prior to the incidents or could easily predict that a crime might occur, given the location or state of the premises.[174] Rather, what seems to lie behind many of these restrictive decisions is a policy judgment that institutional defendants should not be held accountable, despite the foreseeability of the attacks. In support of this view, restrictive courts tend to conceptualize the problem as one of "random crime," rather than as a systemic problem of high rates of rape and sexual assault which disparately affect women and other vulnerable groups.[175]

Interestingly, the new *Restatement (Third)* has stepped out in front of the courts by taking the position that it is improper to rely on lack of foreseeability as a basis for denying a duty in physical harm cases, including third-party criminal attack cases. Section 7(b) of the *Restatement (Third)* creates a default duty of reasonable care whenever a defendant's conduct causes physical harm, providing an exception only "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases."[176] This default duty to exercise reasonable care operates to impose a duty on businesses to guard against third-party criminal attacks, whether a defendant's conduct is characterized as misfeasance or nonfeasance.[177] Section 7's default duty of reasonable care applies in cases of misfeasance where it can be said that a defendant's action created a risk of criminal activity.[178] If the case is classified as one of nonfeasance, the plaintiff must prove the existence of a special relationship between the plaintiff and the defendant before a duty is imposed.[179] The *Restatement*'s list of special relationships is quite broad, however, and captures most of the recurring cases involving third-party crimes.[180]

The most innovative aspect of the *Restatement (Third)* is its rejection of the use of foreseeability as a ground for deciding whether a duty exists,[181] despite widespread reliance on foreseeability in the various tests used by the courts.[182] The *Restatement (Third)* recognizes and criticizes this practice stating that:

> Judicial reliance on foreseeability under specific facts occurs more frequently and aggressively in cases involving an affirmative duty than in other cases. . . . This tendency is even more pronounced in

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[174] *See supra* note 172.

[175] *See* Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215–16 (Cal. 1993).

[176] RESTATEMENT (THIRD) § 7(b).

[177] *Id.* § 7 cmt. a.

[178] *Id.*

[179] *Id.* § 7 cmt. e.

[180] *See id.* § 40(b)(3) (special relationship between "business or other possessor of land that holds its premises open to the public with those who are lawfully on the premises"); and *id.* § 40(b)(6) (special relationship of "landlord with its tenants").

[181] *See id.* §§ 37 cmt. f, 7 cmt. j.

[182] *Id.* § 7 cmt. f.

> cases in which the alleged duty involves protecting the plaintiff from third parties, especially the criminal acts of third parties. Sometimes, courts develop specific rules or balancing tests about the quantity, quality, and similarity of prior episodes required to satisfy foreseeability. . . . Invoking no duty in these situations is more comfortable for courts because duty remains a question of law for the court. Yet determinations of no breach as a matter of law more accurately reflect that the court is pretermitting jury consideration of an element of the case traditionally left to the jury.[183]

Importantly, this stance marks a rejection of the prominent California approach and is designed to discourage courts from granting and upholding summary judgments simply by indicating that the attack in question was unforeseeable. However, even under the *Restatement*'s approach, courts are still entitled to take a case away from the jury by, for example, determining that the specific precautions taken by defendants were adequate as a matter of law (i.e., no breach of duty) or for lack of causation. Additionally, courts are authorized to declare a policy exception from the duty to exercise reasonable care in "exceptional" cases.[184] As Jonathan Cardi and Michael Green describe it, however, the difference in the *Restatement*'s approach is that it "requires judges to recognize and acknowledge that they are deciding a matter ordinarily left to the jury" and thus "imposes an appropriate psychological hurdle for a judge before so ruling."[185] The main point is to encourage judicial restraint and transparency and to underscore that judicial rulings on duty constitute "an incursion on the role of the jury as fact-finder and as the repository of common sense normative wisdom in individual cases."[186]

It is not clear whether the courts will give up on foreseeability and agree to follow the *Restatement*'s injunction to approach duty as a policy matter. Moreover, a shift to policy does not guarantee that more cases will be sent to the jury or that women's perspectives will be taken into account in determining the appropriate level of safety. Nevertheless, the *Restatement*'s policy approach does seem to invite courts to notice the gender dimension of third-party rape cases and to consider what effects allowing or denying such claims might have on the incidence of rape and sexual assault and ultimately on women's mobility and sexual autonomy.

B. Victim Fault and No-Duty Rules

We have seen that tort doctrine governing duty draws no distinction between sexual assault and other criminal attack cases. When it comes to

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[183] *See id.* § 37 cmt. f.

[184] *See* Ky. Fried Chicken of Cal., Inc. v. Super. Ct., 927 P.2d 1260, 1270 (Cal. 1997) (holding that shopkeeper had no duty to comply with robber's demand for money).

[185] Cardi & Green, *supra* note 133, at 729.

[186] *See* RESTATEMENT (THIRD) § 37 cmt. f.

matters of victim fault, however, a distinctive body of law has developed that, in practice, appears limited to rape and sexual assault cases.[187] In several third-party sexual assault cases, some courts have held that a rape victim's "unreasonable" conduct in exposing herself to rape operates to reduce or deny recovery under a comparative negligence regime.[188] It is in this corner of the law affecting third-party claims that perspectives and considerations of gender equality surface most prominently, again centering on the core issue of duty.

It goes without saying that limiting the legal rights of rape victims if they fail to prevent or mitigate their injuries is an explosive subject for feminist legal scholars and activists. In the criminal law context, feminists have long argued against victim-blaming discourses and special legal obstacles, such as resistance requirements and perpetrator-centered definitions of consent that are imposed in rape cases only.[189] Thus, the fact that victim fault arises only in third-party rape or sexual assault cases, and not third-party criminal attack cases more generally, marks this issue as especially troublesome.

The dilemma over the proper treatment of victim fault in civil rape cases is primarily a function of the shift to third-party litigation. In earlier days, when rape victims sued their assailants directly under intentional tort theories, contributory negligence of the victim was routinely held to be no defense.[190] This same rule largely holds true today in direct claims against assailants, under the theory that intentional conduct cannot be compared to mere negligent acts.[191] In third-party cases, however, the basis for a defendant's liability is negligence, raising the question of whether courts should follow the usual rule of permitting a plaintiff's own contributory negligence to reduce recovery. It should be noted, moreover, that because most jurisdictions embrace a modified system of comparative fault that bars recovery when a plaintiff's fault reaches a certain threshold (typically 50% or 51%), the effect of raising a plaintiff's comparative fault can lead to no recovery at all.[192]

The kind of behavior that has led courts to submit the question of a rape victim's fault to the jury follows a script familiar to feminists who have resisted the persistent cultural tendency to assign women the responsibility for protecting themselves against sexual assault by

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[187] *See* Bublick, *Citizen No-Duty Rules*, *supra* note 15, at 1430–31.

[188] *See, e.g.*, Wassell v. Adams, 865 F.2d 849, 851 (7th Cir. 1989).

[189] *See, e.g.*, Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 138–39 (1992); Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1125 (1993); Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2688, 2691–92 (1991).

[190] *See* DOBBS, *supra* note 134, at 498.

[191] However, a few courts have even allowed a jury to compare the negligence of the victim against the intentional actions of the rapist in assessing their respective percentages of fault. *See* Bublick, *Citizen No-Duty Rules, supra* note 15, at 1428–31.

[192] DOBBS, *supra* note 134, at 503–06.

scrupulously monitoring their daily behavior.[193] In a path-breaking article on the subject, Ellen Bublick gives the following rich description of the tenor of the civil rape cases raising the victim fault defense:

> The answer, from a broad swath of case law, seems to be that almost any conduct by a woman (and the case law makes it clear that it's a woman) may subject her to an unreasonable risk of rape. According to the cases, a reasonable woman does not go outside alone at night to hail a cab, or walk to her car in a hotel parking lot, especially if a man is outside. She does not take four or five steps inside the door before closing it. She double checks her door locks and is certain that every widow is closed. She does not open the door when someone knocks or invite a salesman into her home or a man into her hotel room. She never drinks alcohol with a man, particularly if he is older or streetwise or someone she has recently met.
>
> One thing we know quite clearly about the reasonable woman from the case law: she is afraid—of going out, of letting someone in, of rape. She is always on guard, and her fear of rape shapes every aspect of her life and conduct.[194]

In the tort context, the issue of victim fault has proved vexing in both stranger and acquaintance rape cases. Undoubtedly, the most notorious stranger rape case is *Wassell v. Adams*,[195] authored by Judge Richard Posner. At issue was the behavior of a young woman who opened the door of her hotel room to an intruder, mistakenly believing that her fiancé had arrived. She subsequently agreed to give the man a drink of water when he requested it and was unable to escape when he brutally attacked her.[196] The jury evidently believed that the young woman was largely responsible for the rape: they assigned 97% fault to her, compared to only 3% to the motel for failing to warn the plaintiff of the dangerous character of the neighborhood or to take other precautions to prevent the rape.[197] Judge Posner upheld the verdict, reasoning that a warning would have done no good and that other precautionary measures were too expensive.[198] He also speculated that, despite the jury's finding of negligence, the jury might have believed that the motel was not really negligent at all, apparently discounting evidence of a prior rape, robbery and an incident in which an intruder had kicked in the door to one of the motel rooms.[199]

In one respect, *Wassell* is an extreme case. It is rare to see such a severe reduction of damages in a stranger rape case. More often, the

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[193] *See* CHAMALLAS, *supra* note 85, at 228–31 (discussing causal attribution, victim responsibility, and rape justification).

[194] Bublick, *Citizen No-Duty Rules*, *supra* note 15, at 1432–33.

[195] 865 F.2d 849 (7th Cir. 1989).

[196] *Id.* at 851.

[197] *Id.* at 852.

[198] *Id.* at 855–56.

[199] *Id.* at 852, 856.

reductions are lower (although often sizeable), as exemplified by the 30% reduction in damages to a woman who was raped in New Orleans when she went outside to hail a cab at 3:00 a.m., found no cabs available, and discovered she had been locked out of her hotel.[200] In acquaintance rape cases, however, there is a greater risk that juries will be especially harsh and will express their moral disapproval of a plaintiff's conduct through a severe reduction of damages or denial of recovery. In one Ohio case, for example, a jury assigned 51% fault to a victim of a violent acquaintance rape when the victim had gone clubbing and drinking with the rapist prior to the assault.[201] Following the modified comparative fault rule in force in Ohio,[202] the assignment had the effect of barring all recovery.

The victim fault cases pose a special challenge in a torts system committed to comparative fault. It should be remembered that, in all cases, plaintiffs have the formidable task of first convincing the court that the defendant had a duty to prevent the rape and that the defendant's action or inaction caused the plaintiff's injury. Only after this burden is met does the issue of the plaintiff's fault come into play. The most controversial question posed by the victim fault cases is whether victims and institutional defendants should be treated alike, presumably because each actor had an opportunity to avert harm but negligently failed to do so. The alternative to such a symmetrical approach is to recognize important differences in the situation of the two actors that justify treating them differently; that is, to see a difference in failing to prevent injury to oneself as opposed to others, to recognize the different kind of costs that each actor pays for not being more cautious or prudent, and to decide whether reducing or barring recovery for rape victims will likely serve the social policy of curtailing high rates of sexual assaults.

The kind of gender-related concerns that arise in civil rape cases would seem to call out for application of a reasonable woman standard to assess victim fault. Particularly at this point in the litigation, it is imperative that women's experiences with rape, the fear of rape, and knowledge of cultural myths about rape be brought to bear on the question. It is telling, however, that neither courts nor commentators have urged reliance on the reasonable woman standard in this context.

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[200] Storts v. Hardee's Food Sys., Inc., No. 983285, 98-3320, 2000 WL 358381, at *2 (10th Cir., Apr. 6, 2000) (30% reduction); Zerangue v. Delta Towers, Ltd., 820 F.2d 130, 132 (5th Cir. 1987). *See also* Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328, 1330 (S.D.N.Y. 1996) (40% reduction); Ledbetter v. Concord Gen. Corp., 651 So. 2d 911, 917 (La. App. 1995) (35% reduction).

[201] Malone v. Courtyard by Marriott Ltd. P'ship, 659 N.E.2d 1242, 1246 (Ohio 1996). *See also* Beul v. Asse Int'l, Inc., 233 F.3d 441, 450 (7th Cir. 2000) (41% reduction for rape of German exchange student by host "father"); Martin v. Prime Hospitality Corp., 785 A.2d 16, 23 (N.J. Super. Ct. App. Div. 2001) (holding that it was an error not to allow evidence of victim's fault in drinking to excess to reduce recovery).

[202] *Malone*, 659 N.E.2d at 1242.

Instead, the leading scholar in this area, Ellen Bublick, has taken a different tack and has argued for a tort rule that would declare that plaintiffs have "no duty" to protect themselves against rape.[203] Notably, in this one specific context, taking the issue away from the jury is offered up as the egalitarian solution which again fixes on duty.

The reasons for not embracing a reasonable woman standard to address the problem of victim fault in civil rape cases are those catalogued previously. The primary concern is that using a reasonable woman standard in this context will likely trigger conventional, but inegalitarian, attitudes towards women and will simply reinforce the belief that women need to "restrict their conduct in ways that men do not."[204] When asked to judge how a reasonable woman would respond to a risk of rape, both male and female jurors may conclude that she should be more careful than a man under the circumstances, much in the same way that some earlier juries believed that women should take more precautions because of their frailty. Put another way, it may well be that use of a reasonable woman standard would encourage juries to use a double standard in evaluating the conduct of a rape victim. Bublick fears, for example, that the reductions in recovery in civil rape cases stem from "what is, in practice if not in theory, a reasonable woman standard."[205]

The history of reform of criminal rape laws has shown that there is a deep-seated cultural tendency for persons to focus on and to criticize the actions of rape victims, a move that frequently deflects attention away from the behavior of the defendant. In third-party rape cases, when the jury is asked specifically to compare the actions of a rape victim and an institutional actor, this cultural tendency to fix upon the victim may be even harder to resist. It may not be enough that the very point of permitting third-party actions is at odds with the notion that individual victims are on their own and cannot expect others to take steps to protect them. Because customary beliefs about women's responsibility to control rape are so well entrenched, stronger medicine than using a perspectival standard may be needed to protect against sexist judgments. As Mayo Moran has suggested, in highly charged contexts such as third-party rape cases, where "there is deeper tension between the legal and the customary norm . . . it may be necessary to use specific provisions to counteract the most prevalent discriminatory understandings and to draw attention to and try to rule out customary errors."[206]

Bublick's recommendation to adopt a "no-duty" rule with respect to victim fault is a good example of such a specific provision.[207] It sends the message that it is not unreasonable for women to venture into areas that may pose a greater risk of rape for them than for most men and relieves

[203] Bublick, *Citizen No-Duty Rules*, *supra* note 15, at 1416.
[204] *Id.* at 1461.
[205] *Id.* at 1460.
[206] MORAN, *supra* note 40, at 15 (2003).
[207] Bublick, *Citizen No-Duty Rules*, *supra* note 15, at 1416.

persons generally of the obligation to take precautions against the risk of sexual assault. As Bublick herself has recognized, labeling such a specific rule a no-duty rule may be "infelicitious," insofar as it suggests that plaintiffs no longer have to act reasonably.[208] It may be preferable to regard the rule as an entitlement, given that the strongest reason for adopting such a rule is to contest the conventional wisdom about what is reasonable conduct and to assure that women are not required to order and monitor their behavior based on a pervasive fear of rape.

The difficulties encountered with victim fault demonstrate that there is no way to address the issue fairly without facing up to the systematic gender inequality in our society. The no-duty rule declares, in effect, that it is unjust to make women shoulder the burden of preventing their own rapes and that every citizen, regardless of gender, "should be entitled to shape her life around the assumption that others will not intentionally rape her."[209] There is no denying that this cost-benefit analysis embodies a normative judgment that clearly prioritizes gender equality and women's physical safety over the interests of institutional defendants who facilitate criminal acts by failing to take reasonable safety precautions. And, for this reason, it is highly controversial. To date, the no-duty approach has received a favorable mention in the *Restatement (Third)*,[210] an important development that might encourage future courts to adopt it. So far, however, in the sexual context, a no-duty rule has been applied only in cases involving sexual molestation of minors,[211] a type of case where there is far less inclination to blame the plaintiff and more cultural pressure to find an avenue for redress. Whether the approach will be taken up in cases of adult victims is an open question.

Finally, it should be noted that a no duty-rule also has the considerable advantage of being framed in gender-neutral terms and making clear that its protection extends to male victims of sexual assault as well as to women. It thus avoids the difficulty of having to choose among a reasonable man, a reasonable victim, or even a reasonable woman standard in picking an appropriate perspectival standard for cases involving male victims. It also prevents juries from faulting male victims for not being strong enough to prevent their own victimization

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[208] Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 1037 (2003) [hereinafter Bublick, *Comparative Fault*] (quoting DOBBS, HAYDEN & BUBLICK, *supra* note 162, at 272).

[209] Bublick, *Citizen No-Duty Rules*, *supra* note 15, at 1416.

[210] RESTATEMENT (THIRD) § 7 cmt. h ("Just as special problems of policy may support a no-duty determination for a defendant, similar concerns may support a no-duty determination for plaintiff negligence."). *See also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. b, note (Proposed Final Draft 1998).

[211] *See* Bjerke v. Johnson, 742 N.W.2d 660 (Minn. 2007); Christensen v. Royal Sch. Dist. No. 160, 124 P.3d 283 (Wash. 2005); DeBose v. Bear Valley Church of Christ, 890 P.2d 214 (Colo. App. 1995); Hutchinson *ex rel.* Hutchinson v. Luddy, 763 A.2d 826 (Pa. Super. Ct. 2000). For a discussion of cases involving minors, see Bublick, *Comparative Fault*, *supra* note 208, at 1021.

and from applying stereotyped beliefs that men do not suffer from aggressive sexual behavior. Its main function can thus be seen as a universal one of protecting the interest in sexual autonomy for both men and women.

C. Race, Economic Status, and Criminal Attacks

We have seen that in third-party rape and sexual assault cases, courts have sometimes considered the gender of the victims and have shown some awareness that the duty rules they articulate—as they relate to the conduct of both the defendant and the plaintiff—have important implications for women's sexual autonomy and physical security. In third-party criminal attack cases not involving sexual assaults, however, there has been comparatively little appreciation for how judicial rulings on duty might disparately affect minority groups or low-income communities. In a few recent cases in which the interests of consumers and residents have been mentioned, moreover, courts have uncritically tended to accept the arguments of defendants that imposing tort liability would not just be bad for the businesses sued but would also harm residents in poorer communities.[212]

In these third-party criminal attack cases, the primary issue is again that of duty and the proper role of foreseeability in the duty analysis. Many of these cases are brought by customers attacked in stores and adjacent parking lots.[213] Despite the existence of conditions that would seem to pose an obvious danger to the shoppers, courts have generally been reluctant to impose a duty that would require businesses to take precautions against criminal attacks, particularly if the threat of liability might mean that the business would be pressured into hiring security guards to patrol dangerous areas.[214] For the most part, the cases stall out on the threshold issue of defendants' duty, never reaching the issue of the comparative fault of the plaintiffs. If the plaintiff does overcome the duty obstacle, however, defendants have generally not attempted to limit the plaintiff's recovery by invoking comparative fault.[215] In contrast to the sexual assault cases, there has been no argument, for example, that a plaintiff was negligent in choosing to shop in an unsafe area.

One example is *Nivens v. 7-11 Hoagy's Corner*,[216] a case decided in 1997 by the Washington Supreme Court in which a customer was brutally

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[212] *See infra* notes 252–58 and accompanying text.

[213] *See, e.g.*, Wal-Mart Stores, Inc. v. Lee, 659 S.E.2d 905 (Ga. Ct. App. 2008).

[214] The precaution of hiring security guards is so prominent that these cases are sometimes referred to as "negligent security" cases.

[215] *See Lee*, 659 S.E.2d at 907 (shopper recovered for being shot while her car was taken at gunpoint in parking lot at 2:00 a.m.). *But cf.* Lannon v. Taco Bell, Inc., 708 P.2d 1370, 1370–73 (Colo. App. 1985) (approving comparative negligence instruction where shopper called attention to himself and ran away from robbery in progress).

[216] 943 P.2d 286 (Wash. 1997) (en banc).

attacked in a parking lot of a 7-Eleven store after he refused to buy beer for youths who approached him. The plaintiff produced evidence that the parking lot had been used for years as a place to gather and drink. On some occasions, as many as 100 young men would congregate in the parking lot, and fights sometimes broke out.[217] In the past, store clerks had been verbally assaulted and were well aware of the problems of loitering, drinking, and fighting on the premises.[218] Prior to the attack on Nivens, however, no customer of the 7-Eleven store had been assaulted.[219]

From the facts, one might have expected that a core issue in the case would be whether the court would insist on proof of prior similar or identical crimes or would instead be willing to find foreseeability and impose a duty based on the existence of the threatening conditions—short of a prior attack—that could escalate into violence. Indeed, the intermediate appellate court ruled for the defendant on this ground, declaring that no reasonable juror could conclude that the loitering teens presented a foreseeable risk of an attack on a shopper.[220] In addition to the foreseeability analysis, however, both the trial court and the Washington Supreme Court also relied on a public policy argument that cut sharply against liability and seemed to question the viability of third-party suits altogether.

The defense strategy, which proved to be successful in *Nivens*, was to frame the contested issue narrowly.[221] The contest became whether the defendant owed a specific affirmative duty to provide armed security guards rather than whether it had a general duty to act reasonably to prevent injury to its customers.[222] Once the court accepted the narrow framing of the case, it had little trouble concluding that no such specific duty existed and accordingly excluded plaintiff's evidence that other 7-Eleven stores in nearby communities had hired security guards to address similar loitering problems.[223] When the case reached the Washington Supreme Court, a divided court also framed the issue narrowly as a dispute over the hiring of armed security guards and upheld summary judgment for the defendant.[224]

The court's refusal to entertain the notion that the defendant's duty to deter attacks might reasonably extend to the provision of armed security guards rested on the belief that providing such security was

[217] *Id.* at 288.

[218] *Id.* at 295 (Sanders, J., dissenting).

[219] *Id.* at 288.

[220] Nivens v. 7-11 Hoagy's Corner, 920 P.2d 241, 250–51 (Wash. Ct. App. 1996) (noting a "dearth of evidence to support a finding that a reasonable person would have foreseen violence of the general type that occurred here").

[221] *Id.* at 244.

[222] *Id.* at 244–47.

[223] *Nivens*, 943 P.2d at 288, 295 (Sanders, J., dissenting).

[224] *Id.* at 293–94. *See also* Maysonet v. KFC, Nat'l Mgmt. Co., 906 F.2d 929, 931–32 (2d Cir. 1990) (no duty to customer stabbed by harassing loiterer while standing in line at KFC in the South Bronx).

"essentially a duty to provide police protection" that was "vested in the government by constitution and statute,"[225] rather than in private parties. By the court's logic, imposing such a duty would be unfair and disproportionate, reasoning that the defendant would then be required "to provide a safer environment on his premises than his invitees would encounter in the community at large."[226] In the court's estimation, even if the police were unable to deter crime in the community, businesses should not have to fill in the gap.[227] In a statement that now seems outdated in light of the contemporary gun rights movement, the court was of the view that to "shift the duty of police protection from the government to the private sector would amount to advocating that members of the public resort to self-help,"[228] a proposition the court regarded as clearly against public policy.

The public policy argument against requiring security guards had first been articulated in *Williams v. Cunningham Drug Stores, Inc.*,[229] a suit involving the shooting of a customer in a Detroit drug store located in a high-crime area. The opinion by the Michigan Supreme Court denying liability depicted shopkeepers as helpless to protect customers, declaring that "[t]oday a crime may be committed anywhere and at any time" and that a shopkeeper "cannot control the incidence of crime in the community."[230] The court downplayed the fact that, prior to the attack, the drug store in question had employed a plainclothes, unarmed security guard to protect the store's assets and to summon medical assistance in emergencies.[231] On the day of the shooting, however, the guard was sick, and the main office failed to supply a substitute.

Although the Court's "no duty" conclusion prevented the plaintiff from even reaching the issue of whether the drug store had unreasonably failed to take precautions to protect its customers, it nevertheless declared that the shopkeeper was as much of an "innocent victim" of crime as the injured customer,[232] displaying a deep-seated hostility toward third-party criminal attack claims generally. Other courts have echoed these sentiments, characterizing the third-party claim as a broad attempt to shift responsibility for police protection from the government to the private sector and as imposing limitless demands on business.[233] The

[225] *Nivens*, 943 P.2d at 293.

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] 418 N.W.2d 381 (Mich. 1988).

[230] *Id.* at 384.

[231] *Id.* at 382–85.

[232] *Id.* at 385 n.19 ("shifting the financial loss caused by crime from one innocent victim to another is improper" (citation omitted)).

[233] *See* Boren v. Worthen Nat'l Bank of Ark., 921 S.W.2d 934, 941 (Ark. 1996).

opinions create the impression that crime is endemic, unforeseeable, and nearly impossible to guard against.[234]

This image of crime as endemic and random, however, masks the reality that different communities have very different rates of crime and that criminal attacks are thus far more likely to occur in some neighborhoods than in others.[235] Although it may be difficult to predict with any precision when and where a given crime will occur, a shopkeeper in a "high crime" area[236] surely has good reason to suspect that its business might be targeted and would be hard-pressed to assert that an attack on one of its customers is truly unforeseeable, in the sense that it is difficult to imagine such an event taking place. In fact, the notion that crime is simultaneously both endemic and random is contradictory and likely built upon the false assumption that an event is unforeseeable unless the details of the occurrence and its timing are predictable, a very strict notion of foreseeability that finds little support in tort law.[237]

Moreover, it is well known that high-crime areas are most likely to be populated by low-income residents, a disproportionate number of whom are racial and ethnic minorities. Racial and ethnic segregation of communities is still pervasive in the United States, in both the inner city, and more recently, moving into the "inner-ring" of the suburbs located near large metropolitan areas. "In 2000, nearly three out of four people living in neighborhoods of concentrated poverty were black or Latino."[238] Most importantly, the empirical evidence demonstrates that "crime rates, especially for violent crime, are particularly high in areas of concentrated

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[234] *See* Goldberg v. Hous. Auth. of Newark, 186 A.2d 291, 297 (N.J. 1962) ("[B]ut how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?").

[235] *See* Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 82–83 (2003) ("[C]rime tends to cluster in discrete geographic areas and is relatively stable within those areas.").

[236] There is no uniform definition of a high-crime area, despite the recent availability of crime mapping software and crime pattern analysis that can be used to compare the incidence of criminal activity in different geographic locations. *See* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1593–95 (2008). In tort cases, expert witnesses are often used to establish the high-crime nature of the area in which the attack took place. *See, e.g.*, Henry v. Parish of Jefferson, 835 So. 2d 912, 918 (La. Ct. App. 2002); Simpson v. Boyd, 880 So. 2d 1047, 1052 (Miss. 2004).

[237] Courts generally require only that the general character of an event or harm be foreseeable, not its precise nature or manner of occurrence. *See, e.g.*, Marshall v. Burger King Corp., 856 N.E.2d 1048, 1060 (Ill. 2006); Bigbee v. Pac. Tel. & Tel. Co., 665 P.2d 947, 952 (Cal. 1983).

[238] john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. 145, 148 (2009) (explaining that concentrated poverty neighborhoods have more than 40% of the population living in poverty).

poverty."[239] The risks of criminal attacks thus do not fall evenly among the members of society, but are one of the heightened risks experienced by residents of the inner city and other high-crime neighborhoods with high concentrations of minorities. It is important to recognize that these risks are not ones that residents of the community have freely accepted or which can fairly be attributed to individual choice. Instead, studies investigating the causes of racial segregation have emphasized that laws and public policies—including racially restricted covenants, restrictions on federal subsidized mortgages, redlining, and steering—have played a prominent role in producing the "racialized spaces" that characterize U.S. cities and suburbs.[240] It is these structural factors, rather than the "irremediable consequence of purely private or individual choices,"[241] that make residence in a high-crime community a matter largely beyond individual control and not so dissimilar to "immutable" factors such as race and gender.

Given the weakness of the lack-of-foreseeability argument for denying a duty in third-party tort cases in high-crime neighborhoods, it is not surprising that some courts have also based their no-duty decisions on the public policy argument that preventing crime is solely a duty assigned to the police, rather than to private entities.[242] Indeed, the emphasis in these cases on the lack of a shopkeeper's duty to provide armed security guards seems largely to perform the rhetorical function of "proving" that such a duty is quintessentially a public one performed by a police officer, by conjuring up an image of an armed policeman, despite the widespread use of private security forces by businesses.[243]

It is significant that the "no-duty-to-provide-police-protection" argument goes against allowing any claim in third-party attack cases, not simply cases involving the failure to provide armed security guards. There is no good reason, for example, why providing adequate lighting in a privately-owned parking lot to prevent crime should be considered a private function, while providing a security guard to prevent crime in the same location is regarded as a public function. Because only private landowners have the authority and the choice to take such preventive measures on their own property,[244] each measure should be acknowledged as privately available and to that degree considered a private function. As a categorical argument, the public/private

[239] Rosenthal, *supra* note 235, at 82.

[240] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

[241] Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 449, 450 (Kimberlé Crenshaw et al. eds., 1995).

[242] *See* Boren v. Worthen Nat'l Bank of Ark., 921 S.W.2d 934, 941 (Ark. 1996).

[243] *See id.*

[244] The duty issue is more complicated if the attack takes place on public property adjacent to the defendant's business. *See, e.g.*, Rhudy v. Bottlecaps Inc., 830 A.2d 402, 406–07 (Del. 2003).

distinction disintegrates rapidly and can easily be detected as masking a policy dispute. Lastly, it is doubtful that many courts today would claim that it is against public policy to create incentives for private business owners to employ armed security guards based on the view that only the police should carry guns.[245] Instead, the success of gun rights advocates in pressing for legislation and judicial rulings allowing private citizens to own and carry weapons underscores a societal willingness to enlist private persons to fight crime.

The argument that the duty to prevent crime is solely a police function is particularly harsh on plaintiffs given the current state of the law regarding tort suits against public entities. The chances of prevailing against a municipality for inadequate police protection under either tort law or a civil rights statute, such as 42 U.S.C. § 1983, are exceedingly small.[246] On the torts front, the "public duty doctrine" which maintains that a municipality's duty to provide police protection is owed only to the public at large and not to any specific individual is still the majority rule.[247] Moreover, since the landmark cases of *Washington v. Davis*[248] and *DeShaney v. Winnebago County Department of Public Service*,[249] to prevail in a § 1983 failure-to-protect case, plaintiffs must prove that the municipality or other governmental body purposefully denied them adequate police protection because of their race, gender, or other group-based characteristic. In most criminal attack cases, plaintiffs will at best be able to prove negligence and will rarely have sufficient evidence of purposeful discrimination or deliberate indifference to rise to the level of a civil rights violation. It is thus fair to conclude that the extremely high thresholds of proof—in both torts and civil rights—have virtually eliminated the option of suing the police for injuries from criminal attacks, except in extremely rare instances in which the police have promised or undertaken special protection to a specific individual in

[245] *But see* Taco Bell, Inc. v. Lannon, 744 P.2d 43, 53 (Colo. 1987) (Erickson, J., dissenting) (arguing that presence of firearms increases the risk of injury).

[246] *See infra* notes 247–50 and accompanying text.

[247] *See* Ezell v. Cockrell, 902 S.W.2d 394, 396–97 (Tenn. 1995) (holding that the public duty doctrine defeats a claim asserting that police negligently failed to arrest drunk driver who caused subsequent accident); Cuffy v. City of N.Y., 505 N.E.2d 937, 940 (N.Y. 1987) (explaining that a public duty rule governs unless agents of municipality through direct contact with plaintiff promised to provide protection).

[248] 426 U.S. 229, 244–45 (1976) (showing of purposeful discrimination required to maintain equal protection claim).

[249] 489 U.S. 189, 191 (1989) (holding that there was no constitutional violation for failing to remove abused boy from custody of his father, despite recurring signs of abuse). *See also* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) (holding that there was no constitutional violation for failing to enforce a domestic abuse restraining order). *See generally* Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 983 (1996) (discussing reluctance to provide a remedy against government in failure-to-protect cases).

advance of the attack.[250] In the current legal environment, taking the position that preventing crime is solely a public police function means that crime victims will likely have no avenue of compensation, save a suit against the assailant.[251]

The third-party tort claims against businesses thus emerge as the primary arena in which the courts must decide whether to prioritize the safety and compensation interests of local consumers and residents over the economic interests of shopkeepers and other business entities. Simply put, imposing a duty to exercise reasonable care affords plaintiffs an opportunity to receive compensation and increases the incentives on businesses to make shopping and other daily activities in high-crime communities safer. No-duty rules, in contrast, prioritize the economic interests of businesses through tort immunity, denying compensation to victims and taking away incentives for local businesses to invest in safety.

To avoid addressing this direct clash of interests, however, in some recent cases defendants have offered an additional "public policy" argument aimed at conflating the interests of residents, consumers, and businesses and making it appear that imposing tort liability actually hurts low-income communities.[252] As articulated most fully by the Pacific Legal Foundation,[253] a right-wing interest group which opposes third-party litigation,[254] the interests of low-income consumers and residents of high-crime communities are best served by denying tort recovery. Noting that "judicial requirements of additional security always have the greatest impact in low-income, high-crime areas,"[255] an attorney for the Pacific Legal Foundation asks a series of rhetorical questions designed to raise the specter of tort liability forcing businesses to relocate out of high-crime communities, leaving low-income and minority residents without needed goods and services:

> Since protection costs money, how would a business

[250] *See, e.g.*, Beal v. City of Seattle, 954 P.2d 237, 246 (Wash. 1998) (finding liability when there was direct contact between police and victim and reliance by victim of express assurances of police assistance).

[251] In some circumstances, the victim of crime may also be able to obtain some compensation through a state victim compensation fund. However, various restrictions on eligibility have reduced the effectiveness of victim compensation funds as a source of financial protection for victims of sexual assault. *See* Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 481 (2005) (noting that victim compensation statutes are useless to many victims because of their tie to the criminal justice process).

[252] *See infra* text accompanying note 258.

[253] Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises,* 28 WHITTIER L. REV. 409 (2006) (arguing that imposing liability hurts low-income communities).

[254] The Pacific Legal Foundation describes part of their mission as defending the "human right of private property" and as protecting "businesses against unfair burdens." *See About PLF*, PAC. LEGAL FOUND., http://community.pacificlegal.org/Page.aspx?pid=262.

[255] La Fetra, *supra* note 253, at 460.

> operating on a small profit margin fulfill its obligation in a high-crime area? If business owners absorb the high cost of protection by raising the price of their goods and services, how will the poor (who most often reside in areas where the incidence of crime is greatest) be able to meet their basic needs given the minimal financial resources available to them? In all practicality, would they not be singled out as the ones to pay for their own police protection? Would it not be more economical for businesses to close their doors and relocate to "safer ground"? If so, how would indigent members of that community who lack the adequate means of transportation be able to obtain needed goods and services?
>
> Businesses can only absorb a certain amount of additional cost before passing those costs onto the customers they serve. If the goods are too high-priced, they will not sell and the business will close. Or if the business decides that it cannot recoup its costs, then it simply will find another location where the clientele can afford the higher prices.[256]

The upshot of this argument is to convince courts that it is futile to try to use tort law to deter criminal attacks and that the best that can be done is to try to prevent businesses from leaving low-income neighborhoods by immunizing them from tort liability. A few courts have accepted this argument and based their no-duty rulings on speculation that imposing tort liability would ultimately harm residents and consumers in low-income areas.[257] One Louisiana court, for example, broadly stated that:

> The more the courts try to off-load the sovereign's responsibility for random third-party criminal acts onto neighborhood businesses, the harder it will be to induce providers of basic services such as grocery stores and pharmacies to locate in high crime areas; and those that do so must then compensate by charging more to offset the added insurance and security expenses. This contributes to the well known fact that residents in poverty areas, which are normally

[256] *Id.* at 460–61 (quoting Sigfredo A. Cabrera, *Negligence Liability of Landowners and Occupiers for the Criminal Conduct of Another: On a Clear Day in California One Can Foresee Forever*, 23 CAL. W. L. REV. 165, 188 (1987) (footnote omitted)).

[257] *See* Stafford v. Church's Fried Chicken, Inc., 629 F. Supp. 1109, 1110 (E.D. Mich. 1986) ("To hold restaurant owners responsible for providing police protection against the criminal conduct of third parties . . . especially those in 'high crime' areas, may drive businesses out of those neighborhoods."); Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 768 (La. 1999) ("Security is a significant monetary expense for any business and further increases the cost of doing business in high crime areas that are already economically depressed."); and Miller v. Whitworth, 455 S.E.2d 821, 827 (W. Va. 1995) (Denying liability for attack in mobile home park because "[p]roviding security to tenants costs money, and some tenants would not be able to afford the rent a landlord would have to charge to provide security in high crime areas. The result would be that low-income persons many find themselves without any housing.").

> also the areas of the highest crime, tend to pay a premium for essential services in spite of the fact that they are the least able to pay.[258]

The flaw in the public policy argument that presumes that imposing tort liability is bad for residents in affected communities, however, is that it draws a straight line from imposing a duty on a particular business to the closing of that business or to substantial price increases in the products which the business sells, without seriously considering the impact of liability insurance on this equation. There is, however, no such direct causal chain. Instead, as insurance scholar Tom Baker reminds us, the existence of liability insurance "shifts the liability of the particular defendant to an entity for which that liability is simply one among an enormous portfolio of contingent financial obligations."[259] For third-party criminal attack claims based on negligence—rather than on an intentional tort theory[260]—businesses are often able to obtain coverage for losses due to criminal attacks as part of their Commercial General Liability policy. Except in those specific instances in which policy exclusions for harm "arising out of an assault and battery" have been construed to deny coverage to taverns, restaurants, and other businesses where alcoholic beverages are served,[261] commercial establishments are able to plan for and protect against losses stemming from robberies and other criminal activities.

Indeed, this ability to shift and spread losses through insurance has contributed to the rise of the so-called enabling torts,[262] such as the third-party criminal attack claim, under the recognition that compensation can best be secured by imposing a duty beyond the criminal wrongdoer. In his history of liability insurance, Kenneth Abraham explains the insurance logic behind the third-party claim:

> Liability has sometimes been imposed on what might be called secondary wrongdoers at least in part because principal wrongdoers in certain settings are likely to be uninsured or underinsured. . . . Relaxation of the no-duty rules in such situations holds a secondary

[258] Thompson v. Winn-Dixie La., Inc., 812 So. 2d 829, 832 (La. Ct. App. 2002). *See also Stafford*, 629 F. Supp. at 1110.

[259] Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 9 (2005).

[260] Liability insurance policies frequently contain an exclusion for intentional torts committed by the insured. However, the "moral hazard" problem often cited in support of the intentional torts exclusion has no relevance in third-party claims based on negligence. *See* Tom Baker, *Liability Insurance at the Tort-Crime Boundary*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 66, 72–73 (David M. Engel & Michael McCann eds., 2009) (criticizing moral hazard argument for intentional torts exclusion).

[261] *See* David A. Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857, 882–83 (2001) (discussing exclusion for harm "arising out of an assault and battery").

[262] The term comes from Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 436 (1999).

> wrongdoer . . . liable for the consequences of the principal wrongdoer's action. In many of these enabling torts the secondary wrongdoer is a socially and economically more responsible individual or enterprise that is far more likely to have liability insurance, and to be covered by that insurance because an intentional-injury exclusion in the policy is inapplicable to a claim for coverage of negligent enabling, than the principal wrongdoer. The expansion of liability for certain enabling torts takes advantage of liability insurance covering categories of actors who previously were protected by a no-duty rule.[263]

Thus, although there can be no guarantee that imposing tort liability will never result in the closing of a vital business or a devastating price hike, such an impact cannot be presumed, particularly with respect to larger enterprises that carry insurance and have the capacity to manage and spread costs among their various stores and enterprises.

The Catch-22 aspect of the pro-defendant, no-duty rulings, moreover, is that plaintiffs who seek to prove that the attack upon them was foreseeable, by showing the high-crime nature of the area where the crime occurred, run headlong into the public policy argument that imposing tort liability in such areas is undesirable.[264] This is because the perceived public policy that claims to "facilitate private enterprise even in high-crime areas"[265] is fundamentally at odds with the general negligence principle that the degree of care required should be commensurate to the risk. When the duty issue is governed by public policy judgments, rather than by foreseeability, political questions about which direction tort policies should take come more sharply into focus.

The balancing of costs and benefits embedded in defendants' arguments that tort liability hurts low-income communities is lopsided and fails to consider whether there is a distinct public policy to be served by encouraging businesses to reduce crime in low-income, high-crime neighborhoods. A very different public policy argument can be seen in some cases—mostly of an earlier vintage—which refused to presume that imposing tort liability would force businesses to relocate or that spreading the costs of attacks among local consumers would severely undermine the economic health of low-income communities.[266] Thus, the Supreme Court of Colorado had little difficulty imposing a duty on a

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[263] KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 196 (2008).

[264] *See, e.g.*, Papadimas v. Mykonos Lounge, 439 N.W.2d 280, 283 (Mich. Ct. App. 1989) ("Although crime occurs more frequently in certain areas of our cities and particular portions of the state, we again decline to apply a higher standard of duty is such so-called high crime areas.").

[265] Williams v. Nevel's-Jarrett Assocs., Inc., 429 N.W.2d 808, 809 (Mich. Ct. App. 1988).

[266] *See, e.g.*, Taco Bell, Inc. v. Lannon, 744 P.2d 43, 49–50 (Colo. 1987) (holding that providing reasonable protections against third party attacks is relatively inexpensive and therefore not an onerous burden).

Taco Bell located in a high-crime community in Denver, stating that it was:

> not unfair that patrons pay a few cents more for items they purchase from such a store and gain the assurance of reasonable protection against criminal activity by shopping there, rather than allow the emotional and physical burden of a criminal attack to fall on the store patron who inadvertently finds himself or herself in the middle of a robbery invited by the store's failure to employ minimal crime deterrence measures.[267]

One good recent example of a court concluding that public policy cuts in favor of imposing a duty comes from the Supreme Court of Connecticut in *Monk v. Temple George Associates*,[268] a case involving a woman who was attacked in a parking lot of a nightclub in New Haven. For this court, the fact that the nightclub was located in a high-crime area served to increase the precautions that the owner should take to prevent crimes on the nightclub's premises, not to decrease them.[269] The court concluded that imposing tort liability would serve the public policy of "promot[ing] business activity in Connecticut cities," that it would not be likely to dampen business, and that the "the benefits of reasonable security probably would outweigh the burden of a marginal increase in parking costs for most customers."[270] Rather than assume that tort liability would force the nightclub to close or relocate, the court concluded that increasing safety might be economically beneficial to the surrounding community in the long run because "more people would be likely to drive into the city if the parking lots located there were safer."[271]

The Connecticut Supreme Court's approach in *Monk* demonstrates that economic analysis—or economic speculation—in third-party tort cases need not invariably cut in favor of the defendant. Whether imposing tort liability in low-income communities will be good or bad for the local economy is an empirical question that crucially depends on the specific local conditions, the particular businesses affected, and the actual (rather than threatened) response of businesses to the imposition of tort liability. It is also the kind of complex, intractable empirical question that will likely remain unanswered, even if disinterested researchers were to decide to take up the issue. As a result, the "public policy" approach to duty in these third-party criminal attack cases can be counted on to yield indeterminate results, often reflecting the courts' shifting political inclinations to side with either tort plaintiffs or institutional defendants.

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[267] *Id.* (quoting Cohen v. Southland Corp., 203 Cal. Rptr. 572, 579 (Cal. Ct. App. 1984)). *See also* Isaacs v. Huntington Mem'l Hosp., 211 Cal. Rptr. 356, 360–61 (Cal. 1985).

[268] 869 A.2d 179, 182 (Conn. 2005).

[269] *Id.* at 184.

[270] *Id.* at 187.

[271] *Id.*

What seems to be missing from the judicial framing of the competing interests at stake in third-party criminal attack cases, however, is an appreciation for the equality interests of low-income and minority plaintiffs and local residents, aside from economic conditions affecting their communities. Significantly, in the third-party rape and sexual assault cases, some courts and commentators have reasoned that if women are disproportionately subjected to the risk of sexual assault, it is only fair to set the level of care at a standard that provides equal safety for women as well as men, presumably even if such response requires additional expenditures.[272] In other words, gender equity in this context requires equal regard for the physical security of women even when women are not similarly situated to men. I detect no similar equality concern for the physical security of racial and ethnic minorities and low-income residents. Notably, courts and commentators have not yet discussed whether imposing a duty to protect against criminal attacks furthers an "equal right" to safety for persons who live in high-crime neighborhoods. Nor is there recognition that racial and class-based equity in this context requires businesses to take precautions proportionate to the risks, even if that entails greater expenditures for crime prevention in some neighborhoods. Crucially, what is missing from the rhetoric of the judicial decisions is the sense that it is unfair to subject some groups of citizens to greater physical risks simply because of where they live.

Even progressive courts such as the Connecticut Supreme Court in *Monk* seem to shy away from discussing race and identifying racial equality as one of the interests at stake in third-party criminal attack cases.[273] Instead, the trend is to ignore race and class or to conflate the interests of racial minorities and low-income residents with that of business. This move, however, does not prevent the decisions from having a racial and class-based impact. Instead, insofar as courts accept that businesses in high-crime neighborhoods have no duty to prevent crime on their premises, they tacitly support race and class-based inequalities by reinforcing and even magnifying disparities between high-crime and safe neighborhoods and between minority and white communities.

Underneath the courts' reluctance to declare that residents of high-crime communities have a right to expect businesses to take reasonable precautions proportionate to the risks may be the unspoken belief that crime in poor, minority communities is natural or inevitable and not the kind of problem redressable through the torts system. Research in cognitive psychology has shown that racial stereotypes and entrenched ideas about the likelihood of suffering experienced by members of different social groups can affect everyday judgments about cause and

[272] *See* cases cited *supra* notes 141, 152.

[273] *See Monk*, 869 A.2d at 187.

responsibility.[274] Because we have come to expect hardship and suffering in low-income minority communities, we may find it harder to imagine negative events turning out differently and find it easier to accept defense arguments that cast businesses as "innocent victims" who are powerless to alter the status quo.[275] This ingrained tendency to regard crime and personal injury as part and parcel of daily life in "racialized spaces" is the backdrop against which plaintiffs must assert their arguments for imposing tort duties, in the hope of encouraging courts and juries to imagine the possibility of a safer and improved community.

At bottom, the debate over duty is a debate over who will be the decision-maker—the judge or the jury. And, as discussed earlier, it is at this point that perspective comes into play. Recognizing that there are equality interests at stake in third-party criminal attack cases helps to identify this type of litigation as a special context in which "culturally polarized understandings of fact" linked to the race and class of the decision-maker is likely to emerge, much like the case of the high-speed police chase decided by U.S. Supreme Court.[276] Sending such cases to the jury has the advantage of increasing the chances that "someone like" the plaintiff—reflecting the diversity of perspectives of residents in the local community—will play a role in determining the level of reasonable care for that community. It also gives a voice to local residents in making the hard tradeoffs between greater safety on the one hand and possible increases in prices and availability of services in high-crime communities on the other hand. Applying a no-duty rule undoubtedly produces more certain results, but has the decidedly negative effect of declaring, once and for all, whose perspective shall govern.

V. CONCLUSION

Despite the prominence of the objective RPS in both black letter tort law and torts folklore, it is a mistake to conclude that contemporary tort law is unaffected by perspective or that cultural debates about the content of reasonableness and due care have not also played out in the torts arena. To be sure, there has been little appetite for adoption of explicit perspectival standards, such as the reasonable woman standard, and even progressive scholars generally conclude that such a change would not likely shape the law in an egalitarian direction. Instead, the contests have been over whether to impose a duty in contexts that involve "culturally polarized understandings of fact" and differing judgments

[274] *See* Ann L. McGill & Ann E. Tenbrunsel, *Mutability and Propensity in Causal Selection*, 79 J. PERSONALITY & SOC. PSYCHOL. 677, 678–79 (2000); Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 595 (2003).

[275] *See* LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 85 (2006).

[276] *See* Scott v. Harris, 127 S. Ct. 1769, 1772–73 (2007).

about reasonable expectations and reasonably safe behavior. As in many other areas of law, the key issue often boils down to whether to send a particular case or issue to the jury.

An examination of third-party criminal attack cases—a context of special importance to women, racial minorities, and low-income plaintiffs—reveals a lack of consensus as to whether commercial and institutional defendants must take reasonable measures to guard against crime on their premises. The chaos in the law reflects the degree of cultural struggle. Particularly in sexual attack cases, some courts have imposed a duty and have begun to articulate a norm of reasonable care that takes into account women's disproportionate vulnerability to rape and sexual assault, requiring defendants to make their premises equally safe for men and women. Many other courts, however, have enlisted a variety of rationales—lack of foreseeability, the random yet endemic nature of crime, the public nature of police protection, and economic hardship to defendants and local communities—to cut off duty and keep these cases from the jury. Moreover, in cases arising in inner city and other high-crime communities, there is little acknowledgment that crime in such areas disproportionately affects minorities and low-income persons and no articulation of a norm of equal safety regardless of where a person resides. The notion that it is reasonable to require businesses in high-crime areas to take precautions proportionate to the risk has not yet taken hold.

In this Article, I have applied insights and findings from critical theory and social science research to underscore the importance of perspective in human decision-making and to build a case for imposing a duty in third-party criminal attack cases. The research has shown that in certain race and gender-salient contexts, perspective does indeed matter. It points to the value of allowing the jury, as the most representative body in the civil process, to have a role in determining and applying norms of reasonableness and due care. My arguments generally align with the recent position taken by the *Restatement (Third) of Torts*, which rejects using foreseeability to limit duty in third-party negligence cases and recognizes that duty questions fundamentally implicate public policy. The all-important question is whether courts will embrace progressive public policies with a goal of providing an equal measure of physical security to vulnerable groups or whether courts will decide to adopt conservative public policies which limit the financial obligations of businesses and allow them to operate without fear of tort liability.

Additionally, it is important to acknowledge that imposing a duty does not always promote egalitarian interests. In third-party rape and sexual assault cases, the imposition of a duty on victims to prevent their own assaults serves mainly to reinforce sexist notions that women are responsible for their own victimization and that they should be faulted for not curtailing their daily activities to guard against the pervasive reality and fear of rape. In this one context, the case law has demonstrated that juries too readily apply conventional, but

inegalitarian, attitudes towards women, "split the baby" by declaring that both the defendant and the plaintiff are at fault, and unjustifiably reduce or deny recovery for sexual assault victims. Tellingly, in non-sexual assault cases, there has been no similar inclination to place comparative responsibility on crime victims once a duty on an institutional defendant is imposed. Apparently, when it comes to matters of sex, the inclination to blame the victim is just too deeply embedded to expect that female representation on the jury alone will counter the ever-resilient sexual double standard. The strong medicine of a no-duty rule that prioritizes women's interests in physical safety and mobility and eliminates comparative fault in rape and sexual assault cases thus seems to be in order.